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fundamental, may not be doubted.

Justice George Sutherland n3

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n3 United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 315 (1936).

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There is no longer a clear division between what is foreign and what is domestic. The world economy, the world environment, the world AIDS crisis, the world arms race -- they affect us all.

President William J. Clinton n4

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n4 President William J. Clinton, We Force the Spring, Presidential Inaugural Address (Jan. 20, 1993), in N.Y. TIMES, Jan. 21, 1993, at A15.

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TEXT:
[*1980] Among domestic constitutional scholars, the debate over the political question doctrine reflects a fundamental contest over the legitimacy and scope of judicial review in a democratic society. This debate is a scholarly perennial, echoing over the generations with the voices of Felix Frankfurter n5 and Learned Hand, n6 Herbert Wechsler n7 and Alexander Bickel, n8 Louis Henkin n9 and Jesse Choper. n10 The Supreme Court's recent application of the doctrine to bar review of the impeachment proceedings of Judge Walter Nixon n11 is likely to trigger [*1981] another round. Among scholars of foreign affairs law, however, the debate over the political question doctrine is actually a conflict about whether judicial review should apply to foreign affairs.

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n5 See Felix Frankfurter, John Marshall and the Judicial Function, 69 HARV. L. REV. 217, 227-28 (1955).

n6 See LEARNED HAND, THE BILL OF RIGHTS 15-18 (Atheneum 1979) (1958).

n7 See Herbert Wechsler, Toward Neutral Principles of Constitutional Law, 73 HARV. L. REV. 1, 7-10 (1959).

n8 See ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 183-98 (2d ed. 1986).

n9 See Louis Henkin, Is There a "Political Question" Doctrine?, 85 YALE L.J. 597, 625 (1976); Louis Henkin, Lexical Priority or "Political Question": A Response, 101 HARV. L. REV. 524, 529 (1987).

n10 See JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 260-379 (1980).

n11 See Nixon v. United States, 113 S. Ct. 732, 739-40 (1993).

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Professor Thomas Frank engages this second debate. Political Questions, Judicial Answers is an elegant, erudite, and often passionate argument for extending the rule of law beyond the water's edge. The foundation of this argument is not a claim about the legitimacy of judicial review, but an attack on the deeply embedded perception that foreign affairs are "different." This perception underpins Justice Sutherland's assertion of a plenary Executive foreign affairs power in United States v. Curtiss-Wright Export Corp., n12 a power constitutionally shielded from judicial review. n13 Similar perceptions underlie both prudential and technical arguments for the application of the political question doctrine in foreign affairs cases, arguments premised on the existence of dangers in the wider world that have long since been banished at home.

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n12 United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936).

n13 In Curtiss-Wright, Justice Sutherland elaborated his personal theory of how the powers that comprise the "external sovereignty" of the United States passed directly from England "to the colonies in their collective and corporate capacity as the United States" and lodged in the Executive. Id. at 316-20. A year later, Justice Sutherland expanded on this theory by holding that "the conduct of foreign relations was committed by the Constitution to the political departments of the government, and the propriety of what may be done in the exercise of this political power was not subject to judicial inquiry or decision." United States v. Belmont, 301 U.S. 324, 328 (1937) (citing Oetjen v. Central Leather Co., 246 U.S. 297, 302 (1918)). Thus was the foundation laid for the claim that all questions concerning the conduct of foreign policy are political questions.

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Franck systematically denies the alleged difference between domestic and foreign affairs in each of the contexts in which it is invoked to justify application of the political question doctrine in foreign affairs cases. To clinch his argument, he points to the German Constitutional Court as an affirmative counterexample of a court that engages in full judicial review of foreign affairs and domestic cases alike. His prescription for U.S. courts reflects the German approach: an absolute duty of judicial review based on the transformation of political questions into "evidentiary" questions. In an era in which all three presidential candidates in the recent campaign sprinkled their debating positions -- on everything from health care to transport -- with references to the actions of our foreign competitors, Franck has similarly succeeded in injecting a healthy comparative element into constitutional commentary.

On closer examination, however, the "evidentiary" label masks more than it resolves. Franck's approach requires judges affirmatively to decide questions that would otherwise be deemed political questions in the guise of assigning burdens of proof. But a court faced with an issue such as whether military skirmishes in a foreign civil war constitute [*1982] "hostilities," and

whether such "hostilities" should be accorded statutory or constitutional significance, cannot hide behind evidentiary sleight of hand. To assign a burden of proof in such a context is to determine which party is likely to be believed and ultimately who shall prevail. This may not be a political question. But neither is it an "evidentiary" question. It is a legal question of statutory or constitutional interpretation.

Further, if in fact courts are being asked to decide all questions that come their way, without the benefit of easy technical solutions, then the domestic debate over the political question doctrine does become relevant. If courts must decide, are we willing to risk the resulting legitimation of a range of foreign affairs outcomes that currently remain contested? Under what circumstances should courts exercise their legitimating function? To pose this question is to invite a rematch between Wechsler and Bickel over the wisdom of an absolute duty of judicial review. Yet Franck, who has taught us much about the concept and consequences of legitimacy in other contexts, n14 chooses not to engage these questions.

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n14 See THOMAS M. FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS 150-207 (1990).

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A final problem is that, even on his own terms, Franck has set out to slay a hydra. After strenuously denying the difference between domestic and foreign affairs in the political question context, he readmits it in the "evidentiary" context and argues that the difference justifies a different standard of review in foreign affairs cases rather than no review at all. Yet to argue that judges have a duty to decide and simultaneously to admit that they are susceptible to those perceptions of difference that ordinarily militate against principled decision is a worrisome combination. It heightens the danger that judges will accept outcomes abroad that they would reject at home. More fundamentally, because Franck himself has rightly defined the problem of the political question doctrine in foreign affairs cases as a problem of "difference," this admission threatens to undermine his entire project.

These criticisms notwithstanding, Franck's proposal has the advantage of removing the political question doctrine as a broad and easy avenue of judicial retreat, a road too often taken. Further, the dangers of unguided judicial discretion in Franck's model could be checked if coupled with a more precise answer to the "difference" question. I suggest that legal analysis alone cannot answer this question. We must turn instead to the study of foreign affairs itself.

International relations theory can help draw lines between foreign and domestic affairs. Equally important, it can help draw lines within foreign affairs, by distinguishing not only between types of issues, but also between types of states. It can help grapple with the underlying [*1983] sources of war and the safeguards of peace. And it can help develop a principled theory of the role of courts operating between states as well as within them. The development of these tools will permit the formulation of specific rules of decision in foreign affairs cases.

I. TRANSFORMING POLITICAL QUESTIONS INTO LEGAL QUESTIONS

The core of Franck's argument is quickly summarized. The rule of law in the U.S. system is coextensive with judicial review. Judicial review should extend equally to foreign and domestic affairs. To the extent that the political question doctrine functions in foreign affairs cases as a mechanism that allows judges to abdicate their obligation of judicial review, it should be abolished. In its place, the United States should follow the German federal constitutional court in recognizing that distinctions between "political" and "legal" questions are inchoate and irrelevant as guides to judicial decisionmaking, and should hence adopt a presumption that all questions are justiciable. To take account of constitutionally granted discretion to the political branches in foreign affairs, courts should replace the political question doctrine with a "rule of evidence" designed to permit "due deference" to the political branches (p. 128). On Franck's logic, upholding the principle of judicial review in all cases extends the rule of law to foreign affairs, even if the practice of deferring to the Executive in its conduct of foreign affairs is left largely undisturbed.

A. An Anglo-Saxon Problem

Among the many virtues of Political Questions, Judicial Answers is its detailed and lively history of the political question doctrine in foreign affairs cases. Franck identifies three components that ultimately merged to form the present-day doctrine. First is a historical "Faustian pact," "the giveback practice of judges who enlarge their jurisdiction over domestic political conflicts but then seek to pacify the enraged political beast by making a grand gesture of jettisoning judicial review of disputes touching foreign affairs" (p. 19). n15 Second is the unreflective adoption of a British precedent that affirmed an absolute and unreviewable royal foreign affairs power and accepted a monarchic tradition that the Court steadily rejected in domestic affairs [*1984] (p. 12). n16 Third is the practice of "double-entry bookkeeping," cases in which courts purport to abstain from judicial review in one part of the decision, but in fact proceed to reach the same result via a full legal analysis of the merits in another (p. 21). Cases in this last category can be cited both in support of the political question doctrine and of the contrary proposition that courts are perfectly capable of adjudicating foreign affairs cases.

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n15 The initial bargain was struck in Marbury v. Madison itself, 5 U.S. (1 Cranch) 137 (1803), when the Supreme Court was still weak. Chief Justice Marshall used a foreign affairs example to illustrate the proposition that:

[T]he President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience. . . . The application of this remark will be perceived by adverting to the act of congress for establishing the department of foreign affairs. . . . The acts of such an officer, as an officer, can never be examinable by the courts (p. 3 (quoting id. at 165-66)).

n16 The British themselves, of course, had waged a long campaign to exert a Parliamentary check on the King in foreign affairs. Raoul Berger argues that the Framers sought to emulate this more recent British tradition. See Raoul

Berger, The Presidential Monopoly of Foreign Relations, 71 MICH. L. REV. 1, 7-10 (1972). Franck does not address this point, but might argue that parliamentary control had merely displaced monarchic control, as opposed to a divided and checked system of power.

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This account suggests that the political question doctrine in foreign affairs cases developed almost by default, with judges either performing their normal function or airily giving away their review powers in cases that had little to do with foreign affairs. It is the history of "How Abdication Crept In" (pp. 10-44). Yet if these are the origins of the political question doctrine in foreign affairs cases, they do not explain its continuing application to such cases. Franck instead emphasizes a pervasive judicial sense that foreign affairs are "different," "that 'it's a jungle out there' and that the conduct of foreign relations therefore requires Americans to tolerate a degree of concentrated power that would be wholly unacceptable domestically" (p. 14). This entrenched belief that foreign affairs are "different" informs three contemporary justifications for reliance on the political question doctrine to avoid decision of any issue with foreign affairs implications. Franck's presentation and rebuttal of each of these rationales yields three of the book's main themes.

The first rationale is itself grounded in the Constitution, the claim that the political question doctrine reflects "constitutionally mandated limits" (p. 31). The critical question here is who shall determine these limits, the courts or the political branches? Franck deems it a "self-evident proposition" that the courts should opine on the scope of the constitutional allotments of political discretion and thereby preserve their exclusive function of constitutional interpretation (p. 31). He firmly rejects the alternative position, that the Executive itself should determine the scope of its discretionary foreign affairs power and that this determination should be unreviewable. Such a claim, he argues, makes a mockery of the very notion of constitutional limits. Chapter Three traces this more expansive constitutional rationale back to its roots in British parliamentary practice, charts its definitive rejection by the Supreme Court in the 1950s, n17 and laments its irrational and unsupported persistence in the lower courts (pp. 31-44).

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n17 The Court rejected this rationale in Reid v. Covert, 354 U.S. 1 (1957), holding that courts have the power to review the constitutionality of the exercise of military jurisdiction over an American citizen abroad, see id. at 18-19. Earlier, the Court had held that the treatment of nonresident enemy aliens by a military tribunal abroad was not subject to judicial review. See Johnson v. Eisentrager, 339 U.S. 763, 784-85 (1950).

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[*1985] A second rationale for the political question doctrine in foreign affairs cases does not deny courts the constitutional power to decide such cases, but argues that they should refrain because of "prudential concerns." These come in four flavors: the unavailability and unsuitability of factual evidence in foreign affairs cases; the lack of judicially manageable standards to resolve policy issues; the inadequacy of judges to decide matters that

potentially affect the survival of the nation; and, the potential undermining of judicial legitimacy through noncompliance with judicial decisions in this area. In response, Franck first argues that the evidentiary question either requires courts merely to "decide complex issues of fact the loci of which are wholly or partially outside the United States" or "relates to evidentiary probity and onuses of proof," both of which are quite manageable problems (p. 48). Second, the articulation of manageable legal standards is a court's job; "only in international matters is a claim of 'no law' thought an acceptable judicial response to legal ambiguity" (p. 50). Third, courts do far greater damage to the national interest by disabling the safeguards afforded by judicial review in an entire class of cases than they could ever do by issuing rulings even in the midst of foreign affairs crises (p. 58). They do not make foreign policy thereby, but rather judicial policy, and thus speak with their own voice in a necessarily multivocal system (p. 5). Finally, Franck insists that concerns about the enforceability of judicial decisions are far more pertinent to the nineteenth century judicial system than to the twentieth, because the modern public has clearly accepted the necessity of "a nondemocratic body of decision makers deliberately insulated from popular political fashion and consciously protected from majoritarian will" (p. 60).

The third rationale for the political question doctrine is an outgrowth of part of the second: the "technical" objection that courts are untrained and hence unable to decide foreign affairs cases (pp. 6-7). Franck meets this objection by first setting forth the parade of horribles invoked by courts as reasons not to decide foreign affairs cases. He then systematically highlights the insubstantiality of such fears by examining all the cases in which courts have had the courage to adjudicate. When judges refuse to abdicate, he argues, "they demonstrate, though rarely expound, a conscious competence that reproves and rebuts the abdicationist judicial proclivity" (p. 63). In the process, they analyze and dismiss governmental assertions of foreign policy and national security interests as insufficient to justify the trampling of [*1986] individual property rights and civil rights. n18 Moreover, in two subject areas, Congress and the Executive have actually combined to mandate adjudication of such delicate questions as the scope of foreign sovereign immunity and the legality of foreign expropriations. n19 The rationale here, ironically enough, is the desire to depoliticize political questions by subjecting them to nondiscretionary judicial review bounded by relatively clear legislative standards.

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n18 The necessity of reaching a comprehensive claims settlement with Iran to resolve the hostage crisis did not prevent the Supreme Court from examining the takings claims of individual litigants. See Dames & Moore v. Regan, 453 U.S. 654, 674 & n.6, 688, 689-90 (1981). The Court ultimately sided with the Executive, but not on political question grounds. See id. at 688. In Kent v. Dulles, 357 U.S. 116 (1958), charges of commmunist infiltration proved unavailing against Mr. Kent's right to travel, see id. at 130. Similarly, in cases such as I.N.S. v. Chadha, 462 U.S. 919 (1983), and United States v. American Tel. & Tel. Co., 567 F.2d 121 (D.C. Cir. 1977), the courts have proved perfectly capable of umpiring separation of powers disputes between the executive and legislative branches, notwithstanding such foreign policy implications as the control of immigration and wiretapping for "national security" purposes (pp. 88-92).

n19 The examples here are the passage of the Second Hickenlooper Amendment, Pub. L. No. 88-633, @ 301(d)(4), 78 Stat. 1009, 1013 (1964) (codified at 22 U.S.C. @ 2370(e)(2) (1988)) (requiring courts to adjudicate the validity of takings alleged to violate international law), and the Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891, 2891 (1976) (codified at 28 U.S.C. @@ 1330, 1332(a)(2)-(4), 1391(f), 1441(d), 1602-1611 (1988)) (setting forth the conditions under which suits may be brought against foreign sovereigns).

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A fourth and final theme running through all these chapters is the incoherence of existing precedent on the political question doctrine. Indeed, Franck argues that the doctrine is in a state of "jurisprudential chaos" (p. 8). It thus invites wholesale reform.

B. A Teutonic Solution

Notwithstanding his pains to demonstrate that U.S. courts have indeed succeeded in adjudicating many foreign affairs cases with their legitimacy and judicial function intact, Franck clinches his argument by looking outside the U.S. system. Not to Britain, whose "system of executive prerogatives and parliamentary supremacy" the American framers strove to reject, but to the Federal Republic of Germany, "a system of separated powers, protected rights, and federalism readily comparable to our own" (p. 107). The German Constitutional Court has "staked out a middle course between judicial abdication and rampant judicial interference in the making and execution of foreign and security policy, one that satisfies systemic imperatives of the rule of law and political flexibility" (p. 107). German jurisprudence begins with the presumption that the tangle of potential distinctions between legal and political questions has no bearing on the amenability of cases to judicial resolution. Subject to constitutional procedures, all questions, in foreign as in domestic affairs, are presumptively subject to judicial review (p. 108).

[*1987] Although they begin at very different points, German and American courts end up at roughly the same place. Franck concedes that, "[m]easured by outcomes, the German judiciary, taking jurisdiction in virtually every instance, has upheld the contested foreign-policy and security initiatives of the political branches in roughly the same proportion . . . as the U.S. federal courts have by practicing abdication" (p. 124). The difference is that German courts profess to be more assertive than they actually are, whereas American courts pretend to be less assertive than they really are. For Franck, however, this is a difference that definitely makes a difference. The German approach is both internally consistent and "consonant with the rule of law" (p. 124). If German courts do not directly constrain the behavior of the political branches, they at least "speak, by word and example, as teachers," "manifesting that in government none are [sic] omnipotent and that the last word belongs to the least dangerous branch" (p. 125). The German approach is thus an appropriate model for the United States, one that can order its chaotic case law without unduly constraining its foreign policy.

The final two chapters of Political Questions, Judicial Answers are devoted to an elaboration of Franck's German-inspired approach to the political question doctrine. He would replace the doctrine with a "rule of evidence" and would condition judicial review in all foreign affairs cases on the adoption of an

evidentiary standard designed to permit the political branches wide latitude and flexibility in the conduct of foreign policy. Even if U.S. courts can be convinced to recognize the distinction between deciding to engage in judicial review and deciding the substantive foreign policy questions at issue in these cases, they will still have "to confront the prudential problems posed by foreign-relations cases," first and foremost "the evidentiary one" (p. 130). From this perspective, the problem becomes how a court is to assess evidence that the political branches transgressed the constitutional boundaries of their discretion both to determine the nation's foreign policy goals and to choose the means to achieve them. The answer, adopted by the German Constitutional Court and suggested by the U.S. Supreme Court in Fiallo v. Bell, n20 a 1977 immigration case, is "a matter of onus and evidentiary weight" (p. 135). To give the political branches virtually free rein, the courts can place the burden of proof on the plaintiff and adopt a "rational basis" standard similar to normal administrative review. To tighten surveillance a bit, various levels of "intermediate scrutiny" might be adopted, such as one that allows a plaintiff relief if she can show governmental action to be "illogical and unjust." n21

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n20 430 U.S. 787 (1977).

n21 Id. at 809 (Marshall, J., dissenting). Franck implies that this standard might equally be applied in foreign affairs cases (p. 135).

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[*1988] Franck himself takes no position on which precise evidentiary standard should be adopted. He contents himself with making a strong case for shifting the entire debate from questions of exclusion or abstention to questions of evidence. Actual standards of review should presumably be worked out on a case-by-case basis. He does, however, devote a final chapter to "special cases" of in camera proceedings and declaratory judgments. He notes that German courts is not burdened with the leadership of the free world. U.S. courts, however, "must be aware of our foreign policy's special global role and its implications for the role of judges in reviewing the constitutionality and legality of policy choices made by foreign-policy managers" (p. 137). Two particular problems are "the government's legitimate need to protect a substantial hoard of secret data, sources, and methods, and its obligation as a superpower to use force quickly and decisively in confrontations with other states in some circumstances" (p. 138).

Once again, however, the solutions to these problems are readily found in analogous domestic circumstances. Secrecy concerns in Freedom of Information Act cases, sometimes directly related to foreign affairs issues, are routinely addressed by in camera proceedings. And in cases in which a court might be otherwise faced with a Hobson's choice of abdication or issuance of an injunction while U.S. troops are on the move, declaratory judgments provide a workable compromise. They allow "judges to declare the law without at the same time also compelling compliance" (p. 154). Thus can foreign relations be "conducted in accordance with the law, but not as invoked by the blade of a judicial guillotine" (p. 153).

II. BEGGING THE (POLITICAL) QUESTION

A. The Limits of Legal Alchemy

Franck's solution is seductive. He appears to transform political questions into legal questions through skilled legal alchemy: conceptual translation from one doctrinal vocabulary to another. Questions of justiciability can certainly be recast as standards of evidentiary review, just as questions of abstention can be recast as questions of conflicts of law, or questions of privacy as questions of equal protection. From the perspective of the disputants in any particular case, the outcome may be exactly the same, but a different and arguably more desirable principle is upheld. This reshaping of the legal landscape bypasses old obstacles and links previously isolated and separated areas, even if it inevitably highlights the contours of new problems.

Moreover, pondering the standard of review would seem to focus the attention of courts and commentators on the canon of foreign policy needs -- secrecy, dispatch, flexibility -- in the context of specific cases. On these facts, from war to wiretapping, what should be the [*1989] scope of political discretion? Franck's point here is less the transformation from political to legal questions, but from abstract to concrete questions. Once a court is seized of the merits of a particular dispute, it is less likely to be swayed by the "mystique" of foreign affairs and the siren song of national interest. On the contrary, he would argue, the government will have to fill those empty concepts with specific content and pinpoint the precise differences between foreign and domestic affairs that would justify a particularly lenient standard of review. Franck himself clearly anticipates such a case-by-case approach, as he refuses to recommend any particular standard of review and implies agreement with the dissent's characterization of the "rational basis" standard of review in Fiallo v. Bell as "toothless" n22 (p. 134).

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n22 Id. at 805.

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On closer examination, however, Franck's formula for converting political questions into "evidentiary questions" is not a universal solution. "Evidentiary" has a reassuringly technical sound, associated with core judicial functions such as fact-finding and assigning burdens of proof. Therein lies its appeal to courts unsure of their footing in foreign affairs. Yet if so construed, the category of "evidentiary questions" can encompass only a fraction of the political questions Franck seems to transform. He actually relies on a much broader definition of "evidentiary," one that ultimately undermines its initial attraction.

Assume that a group of Congressional plaintiffs sues the Administration in an effort to enforce the War Powers Resolution. n23 They claim that U.S. troops acting as "advisors" to a Central American government fighting a civil war are in fact engaged in "hostilities" within the meaning of the Resolution, and thus that the sixty-day time clock established by the Resolution has begun to run. n24 Assuming that the court finds the plaintiffs to have standing, it would face several distinct questions. First, a determination of the facts about the actual conditions faced by U.S. soldiers in the region. Were they under fire? How frequently? With what intensity and duration? To make this determination, the court would hear evidence from a variety of sources: eyewitness testimony,

evidence about the level of pay [*1990] received by troops in recognition of hostile conditions, evidence from intelligence sources.

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n23 50 U.S.C. @@ 1541-1548 (1988). The text presents the facts of Crockett v. Reagan, 558 F. Supp. 893 (D.D.C. 1982), aff'd, 720 F.2d 1355 (D.C. Cir. 1983) (per curiam), cert. denied, 467 U.S. 1251 (1984), a case dismissed in part on political question grounds, see id. at 898.

n24 Section 4(a)(1) of the War Powers Resolution, Pub. L. No. 93-148, @ 4(a)(1), 87 Stat. 555-56 (1973) (codified at 50 U.S.C. @ 1543(a) (1988)), requires the President to submit a report to the Speaker of the House and the President of the Senate when U.S. armed forces are introduced "into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances." Id. Under @ 5(b), any such forces must be withdrawn within sixty days after a report is submitted or is required to be submitted, unless Congress has taken further action. See 50 U.S.C. @ 1544(b) (1988).

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Second, having found the facts, the court would have to interpret them. Even if U.S. troops are subject to enemy fire of a certain duration and intensity, what is the legal significance of these conditions? n25 Specifically, do they constitute "hostilities" in the sense meant by the War Powers Resolution? This question cannot be resolved by the presentation of evidence. On the contrary, it requires the application of a particular provision of law, an exercise that, in turn, requires the interpretation of both law and fact. It is a question not of evidence but of judgment, the very judgment courts seek to avoid when they invoke the political question doctrine.

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n25 The International Court of Justice, faced with the task of determining whether U.S. support for the contras in Nicaragua constituted a violation of international law that prohibits the use of force, distinguished between determining what the United States in fact did (the "existence or nature" of the facts) and the "legal effects" of U.S. conduct. Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 4, 28, 33 (June 27).

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A third question encountered by this hypothetical court would concern the constitutionality of the War Powers Resolution itself. Thus, even if the court found that the facts qualified as "hostilities" within the meaning of the statute, it could determine that Congress does not have the constitutional power to limit the Executive's discretion to deploy troops in the national defense by imposing a sixty-day time limit. Again, this question is not an "evidentiary question," but rather a question of constitutional interpretation.

For Franck, however, all three of these questions could be subsumed under the German approach. "[T]he German courts have redefined the issue," he writes (p. 116).

It is not whether but how judges should decide: what evidentiary credence courts should give to the government's assessment of the facts; how much room they should leave the policymakers to choose among options; on what terms constitutionally protected yet conflicting public and private interests are to be reconciled (pp. 116-17).

Are these evidentiary questions? Yes, according to Franck, in the following sense: they shift the focus "from the issue of jurisdiction to the task of creating rules governing the weight and probity of government evidence in foreign-affairs litigation" (p. 117).

Thus defined, "evidentiary" encompasses the establishment of standards of review and canons of statutory interpretation. For example, the German courts "give the government the benefit of any reasonable doubt" in any foreign affairs case by requiring the plaintiff to "prov[e] the essential ingredients of unconstitutionality or illegality in the challenged actions of the government" (p. 117). Franck similarly classifies the adoption of a "presumption of constitutionality" by a German court [*1991] faced with conflicting treaty interpretations as an "evidenciary [sic] presumption[]" (p. 117).

For Franck, the central evidentiary question in the hypothetical case posed is "[w]ho is to believed about whether forces being dispatched overseas are going 'into hostilities'" (p. 131)? n26 He would favor the Secretary of Defense, and would thus favor the judicial fashioning of a standard of review designed to place the burden of proof on the government's challenger. Yet this analysis begs a fundamental legal, indeed constitutional, question. Even if the technical manipulation of the standard of review is a matter of "onus and evidentiary weight," the determination of how strict or lax that standard of review should be rests on a prior determination of the statutory or constitutional division of power in foreign affairs, a decision to tilt the balance toward the Executive or Congress or individuals affected by foreign policy decisions. This question is precisely what plaintiffs in the majority of foreign affairs cases would have the courts decide. Courts in Franck's scheme would decide it not "in evidentiary terms" (p. 130), but on the basis of a general presumption of deference to the Executive. n27

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n26 The author quotes the War Powers Resolution, Pub. L. No. 93-148, @@ 3, 4(a)(1), 87 Stat. 555-56 (1973) (codified at 50 U.S.C. @@ 1542, 1543(a)(1)).

n27 Franck is in fact quite aware of the difference between technical evidentiary questions, standards of review or interpretation, and constitutional separation of powers questions. He categorizes the "judicial system's competence to decide complex issues of fact" that arise outside the United States and issues that relate "to evidentiary probity and onuses of proof" as two "fact-related grounds for judicial abstention" (p. 48). He then distinguishes between these grounds and the absence of applicable legal standards to apply to the facts the evidence establishes (pp. 48-49). All of the above prudential concerns are further distinguished from basic issues of constitutional allocation of competence, which Franck insists courts should resolve just as they would resolve questions of domestic constitutional interpretation (pp. 43-44). The problem is that Franck does not just answer each of these objections on their own terms. Rather, he offers his German-inspired "rule of evidence" as a comprehensive solution. The reader

must conclude either that these issues must be subsumed within a vastly expanded "evidentiary" category, or that Franck offers no criteria for distinguishing between them.

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B. The Limitations of Judicial Review

If Franck cannot transform all questions of legal and political judgment into questions of trial technique, he has at least ensured that courts will exercise that judgment. Yet what substantive outcomes will judicial review of these questions yield? The answer to that question and the palatability of that answer, ignites an old debate.

1. Bickel Redux: The Virtues of Passivity in Foreign Affairs. -- By raising the flag of judicial review and denying the difference between foreign and domestic affairs, Franck rejoins the great debates of the 1950s and 1960s about the role of the courts in a democratic society. He assumes Herbert Wechsler's mantle, arguing for an unqualified [*1992] duty of judicial review. n28 In this guise, however, he must contend with Alexander Bickel, who defends the political question doctrine as the queen of the "passive virtues" that enable a court to decide when not to decide. n29 Franck purports to answer Bickel's defense of the doctrine by rejecting each of the various prudential concerns advanced in its support. His focus on the particulars of each of these objections, however, leads him to miss the larger thrust of Bickel's challenge.

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n28 See Wechsler, supra note 7, at 2-3.

n29 BICKEL, supra note 8, at 183-97.

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Because Franck equates the rule of law with the exercise of judicial review, he would apply the rule of law to foreign affairs by establishing an absolute requirement of judicial review in foreign affairs cases. But how would he justify judicial review as a pillar of the domestic rule of law in a democracy? Franck never tackles this question directly. Bickel's answer, on the other hand -- to take only one celebrated response to this perennial conundrum -- illuminates the connection between the domestic and the foreign affairs debates over the political question doctrine and challenges many of Franck's implicit assumptions. Bickel argues that the legitimate exercise of judicial review in a democracy rests on a court's ability to articulate the "enduring values" of a society. n30 Thus legitimated, courts performing judicial review also perform a larger "legitimating function," both by rallying support for particular legal positions and by symbolizing the power and continuity of the Constitution itself. n31

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n30 Id. at 24-27.

n31 Id. at 30-33.

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Thus, courts must weigh their words. Equally important, they must know when to hold their peace as they wait for principle to ripen in the face of necessary political compromise. n32 The political question doctrine is just one of a number of "techniques that allow leeway to expediency without abandoning principle." n33 More specifically, political questions are questions about which we believe "'that even though there are applicable rules, these rules should be only among the numerous relevant considerations.'" n34 The possibility of a decision on principle exists, but it must bow to necessity: the necessity of national security needs or the limits of domestic political consensus. n35

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n32 See id. at 70-71.

n33 Id. at 71.

n34 Id. at 185 (quoting Louis L. Jaffe, Standing to Secure Judicial Review: Public Actions, 74 HARV. L. REV. 1265, 1303 (1961)).

n35 See id. at 186-87.

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From this perspective, little is to be gained by conditioning a guarantee of judicial review of foreign affairs cases only on the proviso [*1993] that the courts give the political branches virtually free rein. Franck's German example is instructive here. Although it is true that the German Constitutional Court has on occasion been willing to give real teeth to its foreign affairs decisions, it has overwhelmingly tended to favor the Executive. Moreover, as Franck himself points out in arguing for special in camera proceedings and declaratory judgments, the German Court need not contend with the weighty responsibilities of superpower status. The temptation to rubber-stamp the Executive's foreign policy decisions is likely to be even greater in this country.

But if there is little to gain, there is much to lose. Justice Jackson spelled out Bickel's position with anguish and urgency in his dissent in Korematsu v. United States, n36 condemning his brethren for stretching the due process clause to permit the internment of Japanese-Americans on military orders. n37 He acknowledged the inherent difficulty of reviewing military orders. "But if we cannot confine military expedients by the Constitution," he argued, "neither would I distort the Constitution to approve all that the military may deem expedient." n38 Commenting on the nature of the legal process, he continued:

[A] judicial construction of the due process clause that will sustain this order is a far more subtle blow to liberty than the promulgation of the order itself. A military order, however unconstitutional, is not apt to last longer than the military emergency. . . . But once a judicial opinion rationalizes such an order to show that it conforms to the Constitution, or rather rationalizes the Constitution to show that the Constitution sanctions such an order, the Court for all time has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens.

The principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need. n39

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n36 323 U.S. 214, 242 (1944) (Jackson, J., dissenting).

n37 See id. at 244-46.

n38 Id. at 244.

n39 Id. at 245-46.

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Justice Jackson argued for a decision on the merits, on the principle that civil courts could not be required to enforce unconstitutional military orders. A majority of the Court was not persuaded, however. At such a pass, would not the political question doctrine have offered a second-best solution? The effective outcome would have been the same, but no principle could have been adduced "'to expand itself to the limit of its logic.'" n40 Conversely, would it not have been worse for courts to have legitimized Executive foreign policy decisions in the various cases in which they did invoke the political question doctrine? To have affirmed the use of the Tonkin Gulf Resolution as a legal [*1994] basis for the war in Vietnam? n41 Or the President's failure to consult Congress on the use of force in El Salvador, n42 Nicaragua, n43 and the Persian Gulf? n44 To have sanctioned the Cuban expropriation of U.S. property? n45 To have endorsed the President's unilateral termination of a treaty? n46 To have authorized the U.S. government's blithe bypass of the arbitration provisions in the U.N. Headquarters Agreement? n47 Indeed, a cynical view would suggest that courts are perfectly capable of rejecting the political question doctrine when they have made up their minds to decide against the government, whether the U.S. government or a foreign power. They are more likely to invoke it as an alternative to deciding in favor of that government.

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n40 Id. at 246 (quoting BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 51 (1921)).

n41 See generally John H. Ely, The American War in Indochina, Part I: The (Troubled) Constitutionality of the War They Told Us About, 42 STAN. L. REV. 877, 884-96 (1990) (discussing the political controversy surrounding the passing of the Tonkin Gulf Resolution); John H. Ely, The American War in Indochina, Part II: The Unconstitutionality of the War They Didn't Tell Us About, 42 STAN. L. REV. 1093, 1104-05 (1990) (discussing whether the Tonkin Gulf Resolution authorized the war in Laos).

n42 See Crockett v. Reagan, 558 F. Supp. 893, 898 (D.D.C. 1982) (holding that a lack of judicially discoverable standards prevented adjudication of a claim that the President, the Secretary of State, and the Secretary of Defense supplied military equipment and aid to the Government of El Salvador in violation of the War Powers Resolution), aff'd, 720 F.2d 1355 (D.C. Cir. 1983) (per curiam), cert. denied, 467 U.S. 1251 (1984).

n43 See Sanchez-Espinoza v. Reagan, 568 F. Supp. 596, 599-600 (D.D.C. 1983) (applying the political question doctrine to bar adjudication of claims by Nicaraguan citizens, U.S. Congressmen, and U.S. citizens challenging the Reagan Administration's support of the contras in Nicaragua and seeking damages and declaratory and injunctive relief), aff'd on other grounds, 770 F.2d 202 (D.C. Cir. 1985).

n44 See Lowry v. Reagan, 676 F. Supp. 333, 341 (1987) (dismissing on political question grounds congressional claims that Executive deployment of U.S. armed forces in the Persian Gulf violated the War Powers Resolution).

n45 See Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 400-01 (1964) (applying the act of state doctrine to bar review of the validity of a Cuban expropriation of the property of U.S. citizens).

n46 See Goldwater v. Carter, 444 U.S. 996, 1002 (1979) (Rehnquist, J., concurring) (holding that the President's unilateral termination of the Mutual Defense Treaty with Taiwan was a political question).

n47 See United States v. Palestine Liberation Org., 695 F. Supp. 1456, 1461-63 (S.D.N.Y. 1988) (finding that the question whether the United States and the United Nations agreed to submit to binding arbitration of all disputes that arise under the U.N. Headquarters Agreement is a political question even in the wake of a decision of the International Court of Justice that interpreted the Agreement to contain such an obligation).

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Affirmative legitimation of these outcomes would be problematic by any measure. But for the majority of scholars opposing the current use of the political question doctrine in foreign affairs cases, this solution could entail a new Faustian bargain. A primary concern of many foreign affairs scholars writing in the post-Vietnam era has been less to secure a theoretically consistent and politically justifiable account of the role of courts in a democracy than to police a range of [*1995] substantive outcomes in foreign affairs cases. n48 They would revive the "checking function" of courts more than the "legitimating function," n49 with the particular hope of checking the steadily expanding foreign affairs powers of the Executive branch.

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n48 See, e.g., MICHAEL J. GLENNON, CONSTITUTIONAL DIPLOMACY 319-20 (1990) (complaining that "the Executive almost always wins if the courts sit on the sidelines" and citing an example from a challenge to the Vietnam War to demonstrate the implications of judicial abstention); HAROLD H. KOH, THE NATIONAL SECURITY CONSTITUTION 146-49 (1990) (describing judicial refusal to examine challenges to the President's authority on the merits and implying that it contributed to the Iran-Contra affair and other cases of the Executive going "above" the law); LOUIS HENKIN, CONSTITUTIONALISM, DEMOCRACY, AND FOREIGN AFFAIRS 17, 85-86 (1990) (stating that the courts should ensure that the Executive follows the laws of Congress and implying that the courts should prevent the Executive from "flout[ing] the law, as in the Iran-Contra disgrace"); Henkin, Is There a "Political Question" Doctrine?, supra note 9, at 624 ("I see no reason why the usurpation alleged in [cases challenging the constitutionality of the Vietnam War] should, exceptionally, have been exempt

from judicial review."); see also David Cole, Challenging Covert War: The Politics of the Political Question Doctrine, 26 HARV. INT'L L.J. 155, 158-68 (1985) (questioning the use of the political question doctrine to dismiss challenges to U.S. actions in Nicaragua); John H. Ely, Suppose Congress Wanted a War Powers Act that Worked, 88 COLUM. L. REV. 1379, 1406-12 (1988) (suggesting that the judiciary not employ the political question doctrine to avoid ruling on whether the Executive has complied with the War Powers Resolution); Jules Lobel, The Limits of Constitutional Power: Conflicts Between Foreign Policy and International Law, 71 VA. L. REV. 1071, 1166-79 (1985) (arguing that the judiciary should not use the political question doctrine to abstain from reviewing alleged violations of international law by the other branches).

By drawing this contrast between the aims of foreign affairs scholars and their domestic counterparts, I do not mean to suggest that the domestic debate over the legitimacy of judicial review has no substantive stakes. But the titans of the legal process school regarded themselves as scholars engaged in a larger process of reconstruction, the relegitimization of courts after the assaults of legal realism. Indeed, Wechsler pursued his logic to the point that it threatened to undermine the legitimacy of Brown v. Board of Education, 344 U.S. 483 (1954), the outcome of which he wished to support. See Wechsler, supra note 7, at 31-34.

n49 BICKEL, supra note 8, at 29.

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2. Franck's Rejoinder: Nothing Ventured. . . . -- Several responses come to mind in defense of Franck's position. First is an argument that is second nature to any international lawyer: the attribution of some constraining power to the mere requirement of a justification for action. How else could the outlawing of war be expected to have any effect in the "anarchical society" n50 of nations, if not by at least requiring nations to offer a minimally plausible rationale for their actions? n51 On this logic, even the mildest form of judicial review will compel the government to justify its actions. This requirement, however loose, will strengthen a norm of accountability and will create a record that can later serve as a measuring stick for inconsistency and prevarication. A second and complementary response [*1996] rests on the dynamic of judicial self-assertion. Martin Shapiro has demonstrated that even the mildest "giving reasons" requirements in administrative law tend inexorably to metamorphose into "giving good reasons" requirements, which in turn engage the courts in an inquiry into what constitutes a good reason in the particular substantive context at hand. n52 If this dynamic holds in the foreign affairs context, Franck's argument is a clever thin edge of the wedge, designed to excite as little objection as possible while ultimately fulfilling the highest aspirations of judicial activists in this area.

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n50 HEDLEY BULL, THE ANARCHICAL SOCIETY 46 (1977).

n51 See, e.g., LOUIS HENKIN, HOW NATIONS BEHAVE 28 (1968) ("Most important, the question is not whether law is enforceable or even effectively enforced; rather, whether law is observed, whether it governs or influences behavior. . . .").

n52 See Martin Shapiro, The Giving Reasons Requirement, 1992 U. CHI. LEGAL F. 179, 187.

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A third response would rely on historical experience of judicial assertiveness in foreign affairs. The perennial touchstone for those commentators who would see courts curb Executive power is Youngstown Sheet & Tube Co. v. Sawyer, n53 in which the Supreme Court was willing to face down President Truman over his seizure of the steel mills during the Korean War. n54 The Court stood firm; the Executive gave way. With this model in mind, Franck's solution looks particularly promising. If nudging the courts back toward a Youngstown posture requires stiffening the judicial spine, then foreclosing the option of abdication is the necessary first step. n55

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n53 343 U.S. 579 (1952).

n54 See id. at 587-89.

n55 Both Harold Koh and Michael Glennon, to take only the most prominent examples, use Youngstown as a model of what Koh refers to as "balanced institutional participation" in foreign policy, a model that must somehow be reestablished. KOH, supra note 48, at 73; see GLENNON, supra note 48, at 199.

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These arguments raise their own rejoinders. Youngstown, for instance, was in many ways a domestic case. Justice Jackson worried above all that the President would be able to erode limits on his domestic powers by linking the exercise of such powers to his conduct of foreign affairs, which Jackson acknowledged "is . . . largely uncontrolled, and often even is unknown. . . ." n56 Further, Youngstown must be contrasted with Dames & Moore v. Regan, n57 in which the plaintiff challenged the Executive orders that implemented the U.S.-Iranian claims settlement agreement as an unconstitutional taking of property held within the United States, just as plaintiffs in Youngstown challenged the seizure of the mills as a taking within the United States. n58 Justice Rehnquist, Justice Jackson's former clerk, applied the famous tripartite framework of analysis developed by Justice Jackson [*1997] in Youngstown, but this time to uphold the President's authority to conclude the agreement. n59

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n56 Youngstown, 343 U.S. at 642 (Jackson, J., concurring). Justice Jackson further declared his unwillingness to "circumscribe, much less to contract, the lawful role of the President as Commander-in-Chief," as long as "the instruments of national force" were "turned against the outside world for the security of our society." Id. at 645.

n57 453 U.S. 654 (1981).

n58 See id. at 662-67.

n59 See id.

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It is possible to distinguish the two cases on various grounds, most notably the existence of a line of precedent that supports the Executive's authority to settle international claims. n60 Whether the penumbra of that authority should extend to the suspension of claims pending in U.S. courts in the absence of Congressional authorization is a harder question, one the Youngstown Court might well have answered negatively. n61 The Dames & Moore Court appears more likely to have been motivated by the perceived imperative of avoiding any decision that might have imperiled the U.S.-Iranian agreement for the release of U.S. hostages and thus undermined the credibility of any future administration in a similar situation. Dames & Moore is just as likely to serve as an exemplar for judges as Youngstown. If so, then the argument comes full circle, leading back to the prospect of increased judicial willingness to affirm unilateral Executive action in foreign affairs and thus to undermine further the original constitutional balance between the branches.

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n60 See, e.g., United States v. Pink, 315 U.S. 203, 229 (1942); United States v. Belmont, 301 U.S. 324, 330 (1937).

n61 See KOH, supra note 48, at 139-40.

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Franck chooses not to enter this debate, or at least not at this level. Rather than seeking to counter the risks of judicial legitimation, he simply accepts them. Indeed, he recognizes outright that "pusillanimity and deference, not exaggerated assertiveness, have marked almost every excursion by the American judiciary into foreign-affairs cases" (p. 159). He stands instead on loftier ground. Compelling the courts' performance of their constitutional duty, he argues, is a moral and political imperative (p. 159). He concludes: "America's principal shield and sword is not the nuclear bomb but the most powerful idea in today's political marketplace. That idea is the rule of law. To make the law's writ inoperable at the water's edge is nothing less than an exercise in unilateral moral disarmament" (p. 159).

Judicial review is thus its own justification. This argument from principle stands alongside a strong argument from pragmatism. The temptation to misuse and abuse the political question doctrine as a cover for judicial laziness or fear may simply be too great for judges skittish about any issue with implications beyond the nation's borders. No matter how often the incantation about the distinction between "political questions" and "political cases" is uttered, n62 the doctrine remains an easy out.

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n62 Baker v. Carr, 369 U.S. 186, 217 (1962) ("The doctrine of which we treat is one of 'political questions,' not one of 'political cases.'").

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[*1998] As it stands, the above critique is inconclusive. It depicts Franck's position as offering a choice between no law and bad law, swapping one evil for another. I suggest, however, that the trade-off need not be so stark. In Franck's scheme, I have suggested, courts will face strong incentives to place the stamp of legality on the dictates of necessity. These incentives are rooted in the subterranean source of the political question doctrine, the deeply felt difference between foreign and domestic affairs that gives the doctrine life. Franck recognizes the "difference problem" from the outset, but ultimately fails to resolve it. This failure in turn undermines the desirability of his proposed reform of the political question doctrine. To make judicial review in foreign affairs cases more than a rubber stamp, courts must be able to determine when in fact they can exert the same checks on the exercise of government power abroad as they would at home. The development of criteria to permit this determination would thus complement and improve Franck's solution. In the following section, I suggest ways of pushing beyond Franck's analysis to confront the difference problem head on.

## III. POLITICAL QUESTIONS, POLITICAL SCIENCE ANSWERS

The running theme of Political Questions, Judicial Answers is that foreign affairs are not sufficiently different from domestic affairs to justify application of the political question doctrine. In the context of his own solution, however, Franck must ultimately admit that foreign affairs are sufficiently different from domestic affairs to justify a different standard of judicial review in foreign affairs cases. But what is his metric of difference? Why should not the perception or intuition of difference that leads a court to place a high burden of proof on a plaintiff who challenges governmental action in foreign affairs justify the refusal to engage in judicial review altogether?

Franck might argue here for degrees of difference. Nevertheless, his readmission of the difference problem in the "evidentiary" sphere remains troubling. The court is still acknowledging grounds for departure from the criteria that it would ordinarily apply to the review of governmental action in the domestic sphere. The principles underlying such criteria must now give ground to the political necessities of diplomacy. The law-politics divide here is coextensive with the perceived domestic-foreign divide. Thus, the court is still effectively identifying "political questions," even if it does so as part of the exercise of judicial review. And it has no principles for distinguishing between such questions other than the inchoate perception of yet finer degrees of difference.

Abolishing the political question doctrine will thus abolish political questions only in the most technical sense. Courts remain without compass in the adjudication of foreign affairs cases. They need specific [*1999] rules of decision derived from more general principles that establish when and how the differences between foreign and domestic affairs justify different legal outcomes. Here the Constitution is silent, as Franck himself admits when he concedes the possibility of multiple standards of review. I would go further and argue that law alone, at any level, is unlikely to provide much guidance. We need a theoretical framework that will permit us to organize and use empirical evidence about how the world actually works. n63 Just as tort law must ultimately rely either on a theory of morality or of economics, so foreign affairs law requires a theory of international relations.

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n63 Legal scholars in this field are no strangers to domestic political theory. See, e.g., HENKIN, supra note 48, at 4-16, 41-43 (tracing the shift of the United States from a republic to a democracy and spelling out the implications for foreign affairs law). Others have drawn on the work of contemporary international relations theorists. See, e.g., KOH, supra note 48, at 96-100, 118-23, 224-28 (charting the impact of the United States's changing global role and the growth of international institutions on U.S. constitutional law and the separation of powers). Yet few international legal scholars have confronted international relations theory on its own terms as a comprehensive theory of how nations behave within the international system, or set out systematically to analyze the implications of competing theories for either international or domestic law.

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Let me not claim too much here. No general theory, no matter how powerful and strongly supported by empirical data, can definitively answer a specific set of legal questions. But an understanding of the determinants of peace and war and the relations among different types of states can at least be used to generate general principles to guide foreign affairs lawyers in a more nuanced quest for specific rules of decision.

A. Two Views of the World

Much current foreign affairs law is implicitly informed by a particular school of international relations theory, a school described by one leading political scientist as the dominant paradigm of international relations over the past two millennia. n64 This theory is political realism, an approach best known among international lawyers for its disdain of legal norms in international relations. Political realists accept a model of states as unitary actors whose external behavior is unrelated to internal structure and purpose. Regardless of domestic political, economic, or social configuration, states' relations with one another revolve around the struggle for power. n65 When translated [*2000] into law, realism argues for a radical break between domestic and foreign affairs.

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n64 See Robert O. Keohane, Theory of World Politics: Structural Realism and Beyond, in NEOREALISM AND ITS CRITICS 158, 158 (Robert O. Keohane ed., 1986).

n65 Hans Morgenthau pioneered a revival of political realism in the 1940s. A more recent refinement of political realism is structural realism, or neo-realism, developed principally by Kenneth Waltz. Structural realists assume that international behavior is dictated entirely by external systemic constraints such as the geopolitical configuration of power. For an overview of this literature, see Anne-Marie Slaughter Burley, International Law and International Relations Theory: A Dual Agenda, 87 AM. J. INT'L L. 205 (1993). See generally CONTEMPORARY THEORY IN INTERNATIONAL RELATIONS 30-38, 54-64 (Stanley Hoffmann ed., 1960) (critiquing realist theory and excerpting from the work of Hans J. Morgenthau); Arnold Wolfers, Introduction: Political Theory and International Relations, in THE ANGLO-AMERICAN TRADITION IN FOREIGN AFFAIRS at ix, x (Arnold Wolfers & Laurence W. Martin eds., 1956) (reviewing the origin

and underpinnings of the realist school of thought).

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Consistent with this legacy, the United States has long espoused a modified dualist stance whereby it presents one face to the international legal system and another to its own. n66 The courts determined in the late nineteenth century that domestic statutes could override international treaty obligations as long as the statutes were later in time. n67 The nation could thus be governed by one set of legal rules within and another without, with the Executive alone charged with repairing the damage to the nation's international relations. This divide only deepened with the Curtiss-Wright cult of the "very delicate, plenary and exclusive power of the President as the sole organ of the federal government in international relations." n68 Justice Sutherland's determination to cast the Executive as sole repository of the external sovereignty of the nation can be understood as the quintessential expression of realist theory in foreign affairs law. The Executive alone represents the state as a unitary actor in international relations, a sovereign among sovereigns, freed of whatever constraints might otherwise be imposed by the domestic political system. Further, the Executive's authority in foreign affairs flows not from the people of the United States, but from the autonomous logic of the international system. In 1936, when Justice Sutherland wrote these ideas into law, that logic appeared once again to be the realist logic of the balance of power. n69

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n66 See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW @ 115 (1986).

n67 See, e.g., Chae Chan Ping v. United States, 130 U.S. 581, 600 (1889) (The Chinese Exclusion Case); Edye v. Robertson, 112 U.S. 580, 597-99 (1884) (Head Money Cases); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW @ 115 (1986).

n68 United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936). For additional discussion of Curtiss-Wright, see above note 13 and accompanying text.

n69 For a powerful account of the need to reorient the discipline of international relations toward Realist thinking in the late 1930s, see EDWARD H. CARR, THE TWENTY YEARS' CRISIS: 1919-1939 (2d ed. 1954).

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To the extent realism buttresses the difference between domestic and foreign affairs, it buttresses the political question doctrine. Lawyers of Franck's persuasion will therefore find more comfort in liberal international relations theory, the principal alternative to realism. Among international relations scholars, the label "liberal" has often served as an umbrella term for a wide range of utopian schemes, from [*2001] world government to the dissolution of the state. n70 As used here, however, liberalism refers to the international dimension of domestic liberal political theory. n71 In a nutshell, liberalism looks beyond states to individual and group actors in domestic and transnational civil society; emphasizes the representativeness of governments as a key variable in determining state interests; and, focuses less on power than on the nature and strength of those interests in international bargaining. n72 In contrast to realism, liberalism distinguishes among relations between

different types of states. The result is not the moralism of misunderstood Wilsonianism, but a more sophisticated and pragmatic framework for both analysis and prescription.

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n70 See ANDREW MORAVCSIK, LIBERALISM AND INTERNATIONAL RELATIONS THEORY 1-3 (undated) (Center for International Affairs, Working Paper No. 92-6).

n71 See id. I have summarized these findings and spelled out their implications for domestic, transnational, and international law in International Law and International Relations Theory: A Dual Agenda. See Burley, supra note 65, at 226-39.

n72 See MORAVCSIK, supra note 70, at 6-13.

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The most important empirical confirmation of liberal theory is evidence of the "liberal peace." n73 Liberal states, defined as states with representative governments, market economies, and constitutional protections of civil and political rights, are far less likely to go to war with one another than with nonliberal states, or than nonliberal states are likely to go to war with one another. n74 I have argued elsewhere that this difference in military-political relations among liberal states is replicated in various ways in their legal relations. n75 Some of these differences, in turn, implicate and undermine the alleged difference between domestic and foreign affairs.

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n73 Michael W. Doyle, Kant, Liberal Legacies, and Foreign Affairs, 12 PHIL. & PUB. AFF. 205, 213-15 (1983) [hereinafter Doyle, Kant]; Michael W. Doyle, Liberalism and World Politics, 80 AM. POL. SCI. REV. 1151, 1151 (1986) [hereinafter Doyle, Liberalism].

n74 See Doyle, Kant, supra note 73, at 213 & n.7.

n75 See Anne-Marie Burley, Law Among Liberal States: Liberal Internationalism and the Act of State Doctrine, 92 COLUM. L. REV. 1907, 1916-23 (1992).

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This Review is not the place to explicate a liberal theory of the political question doctrine, much less of foreign affairs law. For purposes of the present discussion, the key point is that, to the extent current foreign affairs doctrines reflect and reinforce realist assumptions, liberal theory can be used to critique those assumptions and illuminate new doctrinal solutions. In particular, liberal analysis casts a new light on the "difference problem." It also generates substantive precepts applicable to common problems in foreign affairs law. Use of such analysis together with Franck's framework, or any other proposal for obligatory judicial review in foreign affairs cases, would not only require judges to decide such cases, but would give them the tools to reach a substantive decision. The following two sections offer [*2002] a sampling of some potential applications of liberal theory to issues left unresolved by Franck's treatment of the political question doctrine.

B. Acts of (Some) State(s) as Political Questions

Liberal theory asserts that foreign affairs differ most sharply from domestic affairs in relations between liberal and nonliberal states. Conversely, in relations among liberal states, foreign and domestic affairs are most convergent. This schema is oversimplified and highly stylized. It is not necessarily applicable to all contexts. But it is a valuable starting point for analysis, particularly regarding the class of cases that involve challenges to the act of a foreign state. Franck cites a subset of these cases as examples of the success of mandated adjudication, n76 but he ignores Justice Brennan's influential characterization of the validity of the act of a foreign state as a political question. n77 The act of state doctrine bars review of the validity of such an act.

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n76 See supra note 18.

n77 See, e.g., First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 787-89 (1972) (Brennan, J., dissenting). For discussion of cases in which the act of state doctrine has been applied to bar adjudication on political questions grounds, see Burley, cited above in note 75, at 1965-69.

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Liberal theory replaces a vertical image of a world divided into the international and domestic levels with a horizontal image of concentric circles. At the center are liberal states, relations among which most closely fit Robert Keohane's and Joseph Nye's concept of "complex interdependence": societies connected by "multiple channels" of communication and action that are "transgovernmental" rather than formally "interstate"; in which the "distinction between domestic and foreign issues becomes blurred," unlike the traditional divide between the high politics of security and the low politics of economy; and in which "[m]ilitary force is not used by governments toward other governments within the region." n78 The next circle includes "quasi-liberal" states, which possess some but not all liberal attributes. The most common members of this group are states with an open market economy but an unrepresentative government. The periphery is reserved for nonliberal states, whose relations with one another and with liberal states conform much more to the traditional realist model of single channels of communication, a sharp divide between domestic and foreign affairs, and relatively frequent resort to force.

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n78 ROBERT O. KEOHANE & JOSEPH S. NYE, POWER AND INTERDEPENDENCE 25 (1977).

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When superimposed on the constellation of doctrines that regulate litigation with foreign sovereigns, n79 this schematic justifies treating all [*2003] cases within the liberal-liberal zone as if there were no difference between foreign and domestic affairs. That is, courts should interpret and apply legal rules regardless of whether those rules are embedded in domestic or foreign law, without extraordinary deference to "political" considerations. The political

question doctrine would apply within this zone only when and to the same extent that a court would be inclined to apply it on a parallel set of domestic facts. If Franck is right that the doctrine is fading in domestic law (p. 19), n80 it should similarly atrophy in all litigation involving liberal states. Outside the purely liberal realm, or on the border, a doctrine like the political question doctrine could still serve an important function if recast in meaningful symbolic terms as a delimitation of the boundary between the liberal and the nonliberal world. Foreign governments that themselves uphold the rule of law should be subject to its transnational extension. Foreign states that do not are beyond the realm of judicial competence to control.

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n79 Representative cases include not only cases in which a foreign sovereign or one of its agencies or instrumentalities is actually a party, but also cases in which the interpretation or review of a sovereign act is at issue.

n80 But see Nixon v. United States, 113 S. Ct. 732, 740 (1993) (holding that the impeachment power is committed to the Senate and thus not judicially reviewable); supra p. 1980.

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Courts already differentiate between these two classes of states in a variety of private international law doctrines that require an assessment of the "adequacy" of the proposed foreign forum, an invitation to judge foreign compliance with general liberal notions of due process of law. n81 These are surely determinations that are within judicial expertise to make and that can also serve as relatively depoliticized proxies for the liberal-nonliberal distinction. In the political question arena, challenges to the acts of foreign governments that themselves provide an adequate forum might thus be adjudicated under ordinary conflicts principles; challenges to the acts of foreign governments that provide no such forum would be deemed beyond the scope of judicial competence. n82

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n81 See GARY B. BORN & DAVID WESTIN, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS: COMMENTARY AND MATERIALS 263-64, 314, 769 (2d ed. 1992).

n82 This is a variation on a liberal revision of the act of state doctrine. I have spelled out this theory in considerably more detail elsewhere. See Burley, supra note 75, at 1986-95.

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C. A Liberal Mandate of Representation and Deliberation

Foreign acts of state are but one relatively small dimension of the political question doctrine. The harder challenge is to generate rules of decision in the wide range of separation of powers and individual rights cases that Franck catalogues as inviting judicial abdication. Such cases typically raise questions of domestic statutory and constitutional law that cannot be resolved by reference to a distinction between liberal and nonliberal states. They may nevertheless be illuminated by other insights from liberal theory. As a

stimulus to [*2004] further thought on the entire spectrum of legal and political questions, let me conclude by sketching one way that liberal theory could be used to buttress the constitutional command of legislative deliberation in war powers cases. n83 Such reinforcement could work to convince a court that had adopted Franck's evidentiary framework in place of the political question doctrine to stand up to the Executive even when the perceived dangers of foreign affairs might most seem to command deference.

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n83 The issues raised in this section are many and complex, as are the variants of liberal theory that might be used to address them. I offer the thoughts that follow only as a point of departure for further analysis.

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A definitive and credible social scientific explanation for the "liberal peace" is still lacking, but political scientists in the field generally agree that part of the explanation rests on the twin factors of representation and deliberation. n84 The best check on unnecessary or premature mobilization for war, as Jefferson and Hamilton well knew, is to transfer the decision to go to war "from the Executive to the Legislative body, from those who are to spend to those who are to pay." n85 Those who are to bear the physical and financial burdens of war must be represented in the decisionmaking process, and not by an elected Executive alone. n86 A second key element is the drag effect created by democratic deliberation. The need to ponder and debate decisions as momentous as those concerning the use of force appears to generate postures of prudence and caution that provide for critical "cooling off periods" between two liberal states. n87

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n84 See IMMANUEL KANT, PERPETUAL PEACE 11-15 (Lewis W. Beck ed., 1957) (1795); Bruce Russett, Politics and Alternative Security: Toward a More Democratic, Therefore More Peaceful, World, in ALTERNATIVE SECURITY: LIVING WITHOUT NUCLEAR DETERRENCE 107, 111 (Burns H. Weston ed., 1990).

n85 Letter from Thomas Jefferson to James Madison (1789), in 15 THE PAPERS OF THOMAS JEFFERSON 397 (Julian P. Boyd ed., 1961); see also THE FEDERALIST No. 24, at 158 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (noting that the power to raise armies was in the legislature and that even they should only appropriate money for no more than two years). John Jay also noted the additional causes of war brought about by absolute monarchs, who "will often make war when their nations are to get nothing by it. . . ." THE FEDERALIST No. 4, at 46 (John Jay) (Clinton Rossiter ed., 1961). In some ways Hamilton appears to have met the liberal challenge head on. He specifically inveighed against "visionary or designing men, who stand ready to advocate the paradox of perpetual peace between the States" and offered historical examples to rebut each of the purported liberal wellsprings of peace. THE FEDERALIST No. 6, at 56 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Yet elsewhere even he was willing to "[a]dmit[] that we ought to try the novel and absurd experiment in politics of tying up the hands of government from offensive war founded upon reasons of state. . . ." THE FEDERALIST No. 34, at 208 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

n86 Madison wrote to Thomas Jefferson that "'the constitution supposes, what the History of all Gov[ernmen]ts demonstrates, that the Ex[ecutive] is the branch of power most interested in war, & most prone to it. It has accordingly with studied care, vested the question of war in the Legisl[ature].'" GLENNON, supra note 48, at 82-83 (citation omitted).

n87 See BRUCE RUSSETT, GRASPING THE DEMOCRATIC PEACE: PRINCIPLES FOR A POST-COLD-WAR WORLD 38-40 (1993).

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[*2005] Taken together, these twin factors argue strongly for the role of representative legislatures as a primary bulwark against war among liberal states. Consider then the familiar scenario of an individual or Congressional challenge to an unauthorized use of force by the Executive. Liberal international relations theory would argue for the judicial reassertion of Congressional prerogatives against an alleged Executive usurpation of the war powers. n88 The harder question is whether a court should adopt this posture when, as liberal theory predicts will be more likely, the Executive seeks to use force against a nonliberal state, a state without the reciprocal safeguards of representation and deliberation. In such cases, judicial insistence on legislative participation in a decision to use force is less likely to produce an actual check on military conflict, because legislatures of liberal states have proved easier to mobilize against nonliberal states. n89 When such support is not forthcoming, however, the Executive should know it at the outset. A fuller answer to this question must await further inquiry into the causes and mechanisms of war between liberal and nonliberal states.

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n88 See U.S. CONST. art. I, @ 8, cl. 11 (the War Powers Clause). Koh, Henkin, and Glennon all chronicle the progression of this usurpation. See GLENNON, supra note 48, at 71-122; HENKIN, supra note 48, at 26-34; KOH, supra note 48, at 117-33.

n89 See RUSSETT, supra note 87, at 38-40; Doyle, Kant, supra note 73, at 225; Doyle, Liberalism, supra note 73, at 1156-57.

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Courts could apply the same principles of representation and deliberation to prevent the Executive from circumventing Congress via the decisionmaking processes of international organizations such as the United Nations. Suppose that President Clinton dedicates an entire U.S. brigade to U.N. service, to be ordered into action at the behest of the Security Council, under U.S. generals who report to a U.N. supervisory committee. He is hailed worldwide for U.S. leadership in creating a new global security system. As a crisis brews in the former Soviet Union, the new U.N. forces, including the U.S. brigade, prepare to intervene not as peacekeepers, but as peacemakers. n90 A group of members of Congress, including the chairpersons of both the House and the Senate Armed Services Committees, sues President Clinton for violating the U.N. Participation Act of 1945. The Act provides that Congress must approve any special agreement between the Executive and the United Nations on the assignment of U.S. forces. n91

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n90 See An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peace-keeping: Report of the Secretary-General, U.N. GAOR, 47th Sess., Agenda Item 10, at 10-16, UN Doc. A/47/277 (1992) (urging expansion of U.N. functions from peacekeeping to peacemaking and peace enforcement).

n91 See United Nations Participation Act (UNPA), Pub. L. No. 264, @ 6, 59 Stat. 619 (1945) (codified at 22 U.S.C. @ 287d (1988)).

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[*2006] A court that confronted this case would have to choose between what Jane Stromseth has identified as the "political accommodation" and the "contractual" models of the distribution of war powers. n92 The political accommodation model would favor the application of the political question doctrine to this dispute, on the theory that the political branches must be left to strike their own equilibrium. n93 The contractual model, by contrast, would require application of the U.N. Participation Act on the premise that the political branches should enter into explicit legislative agreement whenever possible. n94 Franck would probably favor the contractual model, although he is also on record as favoring wide Executive powers over the disposition of troops in U.N. actions. n95 Yet under his standard of review, the Executive might be required only to make a prima facie showing of authority under the U.N. Charter.

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n92 Jane E. Stromseth, Rethinking War Powers: Congress, the President and the United Nations, 81 GEO. L.J. 597, 600-01 (1993).

n93 See Phillip R. Trimble, The Constitutional Common Law of Treaty Interpretation: A Reply to the Formalists, 137 U. PA. L. REV. 1461, 1477-80 (1989); Phillip R. Trimble, The President's Foreign Affairs Power, 83 AM. J. INT'L L. 750, 752-55 (1989). For a similar argument, see The Constitutional Roles of Congress and the President in Declaring and Waging War, Hearing Before the Senate Comm. on the Judiciary, 102d Cong., 1st Sess. 456 (1991) (statement of Gary Born, Partner, Wilmer, Cutler & Pickering).

n94 See Stromseth, supra note 92, at 666-72.

n95 See Thomas M. Franck & Faiza Patel, Agora: The Gulf Crises in International and Foreign Relations Law, 85 AM. J. INT'L L. 63, 74 (1991) (arguing that the adoption of the U.N. Charter in 1945 outlawed war and replaced it with "police actions," and that, by ratifying the Charter, Congress agreed to allow the Executive to commit standing troops to engage in such police actions). Stromseth describes this third position as one representative of the "police power model." Stromseth, supra note 92, at 660-64.

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A normative application of liberal theory would again place a premium on state representation of the widest possible range of individual and group interests. Representation is too important a factor in international relations to be left to the vagaries of shifting legislative-executive compromise. A court should thus decide this case in favor of the contractual model and

interpret applicable legislative provisions such as the U.N. Participation Act to require maximum congressional input. Broader application of this liberal precept gives rise to a grander vision of nations around the world coupling their input to U.N. decisionmaking with the output of their national legislatures, thereby creating a horizontal global political process. n96

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n96 A visionary, if occasionally challenging, projection of this concept to its furthest extreme is Philip Allott's "international society . . . of all societies." Philip Allott, Reconstituting Humanity -- New International Law, 3 EUR. J. INT'L L. 219, 250-51 (1992).

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Conservatives (on the conventional American "liberal-conservative" spectrum) will yawn. What is this prescription but yet another guise for the Democrats' insistence on congressional foreign policy prerogatives, a position honed by four decades of mostly divided government [*2007] and mostly Republican presidents? The significance of liberal international relations theory is that it links constitutional principle with national security. It prescribes action based not on notions of setting an example for the world, nor on fears of imitating and thus becoming the enemy. n97 It argues instead that linking decisions to use force with a maximally representative process of deliberation is the best guarantee of preserving the fragile island of peace the world has thus far secured.

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n97 Justice Jackson spells out this fear most eloquently in the Steel Seizure Cases, comparing the states of emergency authorized by the legislature in France and Britain in World War II with the emergency powers seized by the Executive in Germany. See Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 651-52 (1952) (Jackson, J., concurring).

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## IV. CONCLUSION

Political Questions, Judicial Answers is particularly timely because many former (American) liberal opponents of the political question doctrine will soon be rediscovering its charms. After a decade during which appeals to liberal judges often seemed the only restraint on the conservative foreign policy of the Reagan-Bush era, a struggle now looms between a liberal executive and legislature and a conservative judiciary. Imagine suits challenging potential efforts by President Clinton to maximize the flow of U.S. aid and material to the former Soviet Union; to pressure Israel to honor the civil rights of suspected radical Palestinians; or, to lift the ban on would-be visitors who test HIV-positive. In this context, Franck's approach has the virtue of principle. He is willing to abjure application of the political question doctrine even when it would yield substantive outcomes that he might well approve. Of course, given the leniency of the standard of review that he is willing to countenance, judicial scrutiny would be unlikely to alter these outcomes. Query whether he would be equally satisfied with the results of his prescriptions after a change in administration.

I have suggested that Franck's proposal to reform the political question doctrine is quite likely to result in the affirmative legitimation of many actions undertaken by both the U.S. and foreign governments, and that this result will be a function of a more general absence of any specific criteria to guide review of such actions. Courts will be left with the conviction of difference and the judicial diffidence that it typically engenders. Within Franck's framework, this alleged difference between foreign and domestic affairs is not dispersed or dispelled, but only displaced. To grapple with it directly, lawyers must venture beyond the borders of their own discipline and join the study of law with the study of foreign affairs. They must turn to political science to grapple with the ultimate riddle of political questions.

[*2008] Franck has laid the necessary foundation for a bridge to international relations theory. Further, in other work he has shown himself adept at the application of liberal international relations theory, the school that I have proposed as the most promising source of insights and principles for those engaged in his overall project of extending the rule of law to foreign affairs. For instance, he has pioneered the concept of a human right of "democratic governance" by relying in part on evidence of the liberal peace. n98 Political Answers, Judicial Answers undertook a different task: the redrawing of doctrinal lines to reach the best possible trade-off among competing values. On balance, he offers a sophisticated and provocative, if partial, solution. It is up to his readers to take the next step.

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n98 Thomas M. Franck, The Emerging Right to Democratic Governance, 86 AM. J. INT'L L. 46, 88 (1992).

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LEVEL 1 - 48 OF 96 ITEMS


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# ARTICLE: LOST IN A DOCTRINAL WASTELAND: THE EXCEPTIONALISM OF DOCTORPATIENT SPEECH WITHIN THE REHNQUIST COURT'S FIRST AMENDMENT JURISPRUDENCE

Paula E. Berg +

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SUMMARY:
... OVER THE YEARS, there have been frequent attempts by both public and private entities to regulate the content of doctor-patient speech to advance a particular ideology or accomplish an end unrelated to the promotion of patient health. ... In the past five years, its application has led the Court to uphold only one restriction on the content of commercial speech. ... Indeed, physician-patient speech is arguably even less constitutionally protected than these categories of expression because, according to the Rehnquist Court's decision in R.A.V. v. St. Paul, they may not be regulated on the basis of viewpoint. ... A dispassionate application of established First Amendment doctrine in Rust and Casey would have led the Rehnquist Court to conclude that doctor-patient speech is protected expression that cannot be regulated on the basis of viewpoint. ... The Rehnquist Court's highly protective free speech jurisprudence since Rust and Casey supports the thesis, advanced by some at the time, that the constitutional protection of doctor-patient speech was forfeited to accommodate profound disagreements about the practice of abortion among the Court's members. ... One can only hope, therefore, that the next time the Rehnquist Court confronts a viewpoint-based regulation of physician-patient speech, it will hold its nose and adhere to the dictates of the First Amendment, which, above all else, protects expression regarding practices or subjects that some condemn. ...

TEXT:
[*153]

## I. INTRODUCTION

OVER THE YEARS, there have been frequent attempts by both public and private entities to regulate the content of doctor-patient speech to advance a particular ideology or accomplish an end unrelated to the promotion of patient

health. n1 At various times since the early 1960s, the federal government and certain states have restricted physician-patient speech about contraception and abortion because of ideological opposition to these practices. n2 More recently, managed care organizations [*154] have sought to maximize profits and minimize consumer dissatisfaction by including "gag clauses" in provider contracts. These clauses bar physicians from discussing treatment alternatives and financial incentive arrangements with patients. n3 In 1996, following the November election, federal officials sought to prevent Californians from exercising their newly won right to use marijuana for medical purposes n4 by threatening to criminally prosecute physicians who discussed this subject with patients. n5 Finally, after several juries acquitted Dr. Jack Kevorkian of criminal charges for illegally assisting patient suicides, frustrated prosecutors dispatched police to interrupt his conversations with patients. n6

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n1 This Article uses the term doctor-patient speech to refer to oral communication between physicians and patients that occurs after the formation of a professional relationship concerning symptoms, diagnosis, treatment alternatives, and the wide range of subjects that are commonly discussed in the course of medical decision making.

n2 Many cases involving these restrictions have come before the courts. See, e.g., Griswold v. Connecticut, 381 U.S. 479 (1965) (considering a Connecticut statute prohibiting physicians from counseling patients about contraception and holding that forbidding the use of contraceptives unconstitutionally intrudes upon the right of marital privacy); Charles v. Carey, 627 F.2d 772 (7th Cir. 1980) (finding unconstitutional [on marital privacy grounds] an Illinois statute requiring physicians to deliver a written statement to patients stating that the state views a fetus as a living human being whose life should be preserved). For a more complete description of these measures, see Paula Berg, Toward a First Amendment Theory of Doctor-Patient Discourse and the Right to Receive Unbiased Medical Advice, 74 B.U.L. Rev. 201, 202-03 n.9, 204 n.13 (1994) [hereinafter Berg] (noting that most courts have struck down statutes that criminalize physician speech about contraception and abortion on privacy rather than First Amendment grounds, and listing specific cases that have considered the validity of such statutes).

n3 In 1996, the Health Care Financing Administration (HCFA) barred Medicare and Medicaid HMOs from requiring physicians to withhold information about incentive arrangements and medically necessary treatments from patients. See Medicare and Medicaid Programs: Requirements for Physician Incentive Plans, 42 C.F.R. <sect> 417.479(a) (1998); Clinton Orders HHS to Issue Warning Against Gag Rules in Medicaid HMOs, 6 BNA Health L. Rep. 332, (1997) (describing HHS prohibitions on contractual clauses limiting discussions of treatment options by physicians in Medicaid and Medicare HMOs). Additionally, during the past few years, many states have enacted statutes prohibiting managed care organizations from including gag clauses in their contracts with providers. See, e.g., Cal. Bus. & Prof. Code, <sect> 2056.1(b) (West Supp. 1998) (banning health care service providers from including contractual provisions that interfere with a physician's ability to communicate with patients about treatment options, alternative plans, or coverage arrangements); See Del. Code Ann. tit. 18, <sect> 6407 (1996) (barring HMOs from preventing physicians from giving patients information about diagnoses, prognoses, and treatment options). Congress has yet to act upon legislation prohibiting gag clauses. See 143 Cong. Rec. 51734-02,

51745 (daily ed. Feb. 27, 1997) (prohibiting contractual provisions that restrict providers' medical communications with patients).

n4 See Cal. Health & Safety Code <sect> 11362.5(a) (West Supp. 1998) (decriminalizing medicinal marijuana use under California law). Voters in Arizona approved a similar measure in 1996. See Ariz. Rev. Stat. Ann., <sect> 13-3412.01 (West Supp. 1997) (amending a statute criminalizing marijuana to permit use by terminally and seriously ill patients pursuant to a prescription by a medical practitioner).

n5 See Conant v. McCaffrey, 172 F.R.D. 681 (N.D. Cal. 1997) (holding that threats by federal drug enforcement officials to prosecute physicians for advising patients about the medical use of marijuana after enactment of the California Compassionate Use Act of 1996 violated physicians' and patients' rights under the First Amendment).

n6 A majority of states criminalize assisting another person to commit suicide. See Washington v. Glucksberg, 117 S.Ct. 2258, 2263 (1997) (listing cases which have found assisting in suicide to be criminal). Under the common law, a physician's advice about how to commit suicide amounts to the crime of aiding and abetting a suicide if the advice is given with the intention that it be used and the patient actually commits suicide. See J.C. Smith & Brian Hogan, Criminal Law 380 (7th ed. 1992). If these requirements are satisfied, a physician's speech assisting a suicide is not constitutionally protected because the First Amendment generally does not protect speech utilized to accomplish a crime. See generally Frederick Schauer, The Aim and the Target in Free Speech Methodology, 83 Nw. U. L. Rev. 562, 563 (1989) (stating that crimes committed through linguistic communication are not protected by the First Amendment); Kent Greenawalt, Speech and Crime, 1980 Am. B. Found. Res. J. 645 (1980) (stating that the First Amendment does not cover all linguistically communicative acts).

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The Supreme Court has periodically considered the constitutionality of restrictions on the content of doctor-patient speech. n7 Until recently, however, these provisions, which concerned contraception and abortion, were challenged on the ground that they violated the constitutional right to privacy n8 rather than the free speech rights of patients or doctors. n9

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n7 See, e.g., Webster v. Reproductive Health Servs., 492 U.S. 490, 511 (1989) (considering and upholding a statute that forbade public employees from counseling a woman to have an abortion not needed to save her life); Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986), overruled by Planned Parenthood v. Casey, 505 U.S. 833 (1992) (invalidating a statute requiring that certain information be given to a woman before she consents to an abortion); City of Akron v. Akron Ctr. for Reprod. Health, Inc., 462 U.S. 416, 44445 (1983) (invalidating an informed consent provision designed to persuade women not to have abortions), overruled by Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992); Planned Parenthood v. Danforth, 428 U.S. 52, 65-67 (1976) (upholding a provision requiring a woman to give written consent for an abortion); Griswold v. Connecticut, 381 U.S. at

480 (holding a statute prohibiting counseling about contraception and family planning unconstitutional); Poe v. Ullman, 376 U.S. 497, 498 (1961) (seeking a ruling on the constitutionality of a statute prohibiting the use of contraceptives and the giving of advice regarding their use; the Supreme Court dismissed the case for failing to present a justiciable question).

n8 See Griswold, 381 U.S. at 479 (holding that a Connecticut law forbidding the use of contraceptives intrudes unconstitutionally upon the right of marital privacy) and Roe v. Wade, 410 U.S. 113, 153 (1973) (explaining that the Constitution does guarantee certain fundamental areas, or zones, of personal privacy, including a woman's right to terminate her pregnancy up to a point before the State asserts a compelling state interest).

n9 Justices noted the possibility of a First Amendment violation in several of these cases. See, e.g., City of Akron, 462 U.S. at 472 n.16 (O'Connor, J., dissenting) ("This is not to say that the informed consent provisions may not violate the First Amendment rights of the physician if the State requires him or her to communicate its ideology"); Griswold, 381 U.S. at 507-08 (Black, J., dissenting) ("I can think of no reasons at this time why [physicians'] expressions of views would not be protected by the First and Fourteenth Amendments, which guarantee freedom of speech"); Poe, 367 U.S. at 513 (Douglas, J., dissenting) ("The right of the doctor to advise his patients according to his best lights seems so obviously within First Amendment rights as to need no extended discussion.").

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In the early 1990s, however, the Rehnquist Court considered a pair of cases that offered an opportunity to situate doctor-patient speech within First Amendment jurisprudence and to establish the principle that the Constitution prohibits the federal government from politicizing the practice of medicine by manipulating the content of physicians' conversations with patients. Rust v. Sullivan n10 concerned the constitutionality of regulations promulgated during the Reagan administration n11 [*156] that restricted the conduct n12 and speech of physicians working in family planning clinics funded under Title X of the Public Health Services Act. n13 The speech-related regulations prohibited physicians from providing "counseling concerning the use of abortion as a method of family planning" and from providing referrals to women seeking an abortion. n14 For patients who requested referrals, the regulations recommended a pre-scripted response: "the project does not consider abortion an appropriate method of family planning and therefore does not counsel or refer for abortion." n15

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n10 500 U.S. 173 (1991).

n11 On January 22, 1993, President Clinton issued a memorandum order directing the Secretary of Health and Human Services (HHS) to suspend this rule because it interfered with the doctor-patient relationship. The Title X "Gag Rule," 58 Fed. Reg. 7455 (1993) (stating that the Gag Rule endangers women's lives by preventing them from receiving information that their doctors would otherwise be ethically and morally obligated to provide).

n12 The restrictions imposed on the conduct of Title X grantees prohibited lobbying for legislation that could increase the availability of abortion services, using legal action to make abortion more available, paying dues to any pro-choice group, and failing to maintain a physical separation between Title X-funded projects and any abortion-related activities. See 42 C.F.R. <sect> 59.9 (1997).

n13 42 U.S.C. Sections 300-300a-6 (1994) (prohibiting the use of funds appropriated for family planning services in programs where abortion is a method of family planning); 42 C.F.R. section 59.15 (1997) (restricting disclosure of information about individuals receiving services except as "necessary to provide services to the patient or as required by law, with appropriate safeguards for confidentiality").

n14 42 C.F.R. <sect> 59.8(a)(1) (1997). The regulations also restricted grantees' speech by prohibiting the dissemination of written materials advocating abortion, and by prohibiting prochoice speakers. See also 42 C.F.R. <sect> 59.10 (a) (1997).

n15 42 C.F.R. <sect> 59.8(b)(5) (1997).

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In turning its attention to whether these regulations violated the First Amendment rights of doctors or patients, the Supreme Court did not determine whether they were aimed at the content of expression or whether they were viewpoint-based -the traditional method for analyzing a First Amendment claim. n16 Indeed, the Court's opinion contains no First Amendment analysis of the regulations whatsoever. Instead, the Rehnquist Court skirted the free speech issue entirely, deciding that the regulations were a constitutional exercise of the government's power to fund some activities and not others. As the Court explained, "This is not the case of the Government 'suppressing a dangerous idea,' but of a prohibition on a project grantee or its employees from engaging in activities outside of its scope." n17 The Court hinted that governmental restrictions on doctor-patient speech might violate the Constitu [*157] tion if, for example, doctors were not permitted to disclaim agreement with the government's opinions, or if the doctorpatient relationship was sufficiently "all-encompassing" to justify a patient's expectation of comprehensive medical advice. n18

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n16 See, Laurence H. Tribe, American Constitutional Law <sect> 12-2, at 789-94 (2nd ed. 1988) (explaining the two tracks of analysis for First Amendment claims).

n17 Rust, 500 U.S. at 194.

n18 See id. at 200.

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In Planned Parenthood v. Casey, n19 decided one year after Rust, the Court endorsed an even broader governmental right to manipulate the content of physicians' conversations with patients. n20 Casey challenged the

constitutionality of amendments to a Pennsylvania abortion statute that revived provisions invalidated by the Burger Court six years earlier. n21 In addition to imposing various limitations on the conduct of all Pennsylvania physicians who performed abortions, n22 the so-called informed consent provisions required doctors -- at the risk of losing their medical license -- to provide every patient seeking an [*158] abortion with certain pre-scripted information intended to convey the State's preference for childbirth over abortion. n23 Like Rust's "gag rules," the Pennsylvania statute's speech-related provisions directly regulated the content of physician-patient discourse for the purpose of influencing patients to make a medical decision that conformed to government ideology.

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n19 505 U.S. 833 (1992) (plurality opinion). The plurality opinion was co-authored by Justices O'Connor, Kennedy, and Souter.

n20 In addition to the authors of the plurality opinion, Justices Rehnquist, Scalia, White, and Thomas similarly sanctioned the imposition of viewpoint-based restrictions on physician speech. Id. at 967-68 (Rehnquist, C.J., concurring in part and dissenting in part) (joined by White, J., Scalia, J., and Thomas, J.) (allowing states to compel doctors to utter any information to patients that is relevant and rationally related to legitimate government interest). Only Justices Stevens and Blackmun rejected this proposition. See id. at 914 (Stevens, J., concurring in part and dissenting in part) ("In order to be legitimate, the State's interest must be secular; consistent with the First Amendment the State may not promote a theological or sectarian interest"); and id. at 934-35 (Blackmun, J., concurring in part and dissenting in part) (arguing that the state cannot compel physicians to convey biased information to patients).

n21 See Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986). In Thornburgh, the Burger Court reaffirmed its holding in Planned Parenthood v. Danforth, 428 U.S. 52 (1976), that government may legitimately require physicians to convey information to patients to ensure informed consent, but that speech restrictions intended to influence patients' decision making in accordance with governmental ideology violated the constitutional right to privacy recognized in Roe v. Wade. Id. at 765-67.

n22 The statute prohibited a physician from performing an abortion on a married woman who had not provided the physician with a signed statement that she had notified her husband of her intention to have an abortion, unless the case fell within one of four exceptions to this requirement. 18 Pa. Cons. Stat. Ann. <sect> 3209 (West Supp. 1997). It also prohibited a physician from performing an abortion less than 24 hours after satisfying the "informed consent" requirements. Id. at <sect> 3205 (West 1983 & Supp. 1997). Any person performing an abortion on a woman under 18 years old without parental consent was subject to license suspension and civil action. Id. at <sect> 3206 (West 1983 & Supp. 1997). Finally, the statute required that abortion facilities file reports showing the total number of abortions performed in each trimester, the age of each patient, each patient's prior number of pregnancies and abortions, the weight of each aborted fetus, the marital status of each patient, and, in the case of married parents, whether notice was provided to the husband. Id. <sect> 3214 (West 1983 & Supp. 1997). The Supreme Court invalidated the provision requiring spousal notification on the ground that it imposed an

undue burden on women seeking an abortion. See Casey, 505 U.S. at 895.

n23 The statute required physicians to tell patients seeking an abortion about the availability of printed materials that described the fetus and listed agencies that offered alternatives to abortion; stated that the child's father was liable for financial assistance; and stated that medical assistance might be available for prenatal care, childbirth, and neonatal care. See Pa. Cons. Stat. Ann. <sect> 3205(a)(2)(i)-(iii) (West 1983 & Supp. 1997).

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In Casey, as in Rust, the Court did not analyze whether the provisions interfered with the speech rights of physicians or the audience-based right of patients to receive information. While the Court tipped its hat to the idea that the challenged regulations implicated physicians' speech rights, it summarily dismissed this concern, stating that advising patients is merely a "part of the practice of medicine, subject to reasonable licensing and regulation by the State." n24 Thus, according to Justices O'Connor, Souter, and Kennedy, who jointly authored the plurality opinion, the state's authority to license and regulate the medical profession includes the power to compel physicians to communicate pre-scripted, viewpoint-based statements to patients for the purpose of persuading them to make the medical choices preferred by the state, as long as those statements are not false or misleading. n25

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n24 Casey, 505 U.S. at 884.

n25 Id. at 882. Since the Court rooted this authority in the state's power to regulate the medical profession, the federal government, which lacks this regulatory authority, presumably does not enjoy the same authority to impose viewpoint-based restrictions on doctor-patient speech.

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Taken together, the Rehnquist Court's decisions in Rust and Casey stand for the troubling proposition that the First Amendment does not prohibit the federal government from manipulating the content of physician-patient speech, in both publicly and privately financed settings, in order to promote a particular ideology or to accomplish a policy unrelated to patient health.

As several commentators noted at the time, both Rust and Casey are inconsistent with traditional First Amendment jurisprudence. n26 It is now apparent that Rust and Casey are also [*159] strikingly inconsistent with the Rehnquist Court's own free speech jurisprudence, which has largely taken shape since those decisions were issued. While Rust and Casey suggested that the Court might adopt a tolerant posture toward speech regulations promoting government policy, this has not turned out to be true. Rather, while members of the Rehnquist Court have been deeply divided about many other issues, they have been unusually harmonious in First Amendment cases in demanding strict viewpoint neutrality, and in passionately protecting speakers and listeners from government paternalism. As a result, doctorpatient speech exists within the Rehnquist Court's free speech jurisprudence in a doctrinal wasteland where it is exceptionally vulnerable to governmental manipulation -- more so, in fact, than significantly less meaningful and valued forms of expression.

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n26 See, e.g., Christina E. Wells, Abortion Counseling as Vice Activity: The Free Speech Implications of Rust v. Sullivan and Planned Parenthood v. Casey, 95 Colum. L. Rev. 1724 (1995) (discussing the Supreme Court's departure from traditional First Amendment analysis in Rust and Casey); Berg, supra note 3, at 219 (noting that, when considering doctor-patient speech, the Rehnquist Court has abandoned the First Amendment principle that speech regulations may not favor one viewpoint over another); Michael Fitzpatrick, Rust Corrodes: The First Amendment Implications of Rust v. Sullivan, 45 Stan. L. Rev. 185, 200 (1992) (discussing how Rust is inconsistent with the Supreme Court's historic intolerance of viewpoint-based restrictions); Janet Benshoof, The Chastity Act: Government Manipulation of Abortion Information and the First Amendment, 101 Harv. L. Rev. 1916, 1931-33 (1988) (arguing that one-sided presentation of pregnancy options, as sanctioned by Rust, conflicts with the First Amendment).

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II. VIEWPOINT NEUTRALITY

The central focus of the Rehnquist Court's First Amendment methodology is whether a government regulation is aimed at the content of expression or whether it is content-neutral. n27 Accordingly, the Court generally begins any First Amendment analysis by determining whether a restriction suppresses or advances a particular viewpoint or alters the content of the expression. n28 To protect expression from these most heinous [*160] forms of government distortion, regulations that are content- or viewpoint-based are subject to the "most exacting scrutiny." n29 The highly protective nature of this standard is evidenced historically by the consequences of its application. No viewpointbased and virtually no content-based restriction of speech has ever survived strict scrutiny review. n30

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n27 As Professor Mark Tushnet explains:

Over the past decade the Supreme Court has re-conceptualized free speech law. The Warren Court began to organize free speech law around a new set of concepts, but the modern law of the First Amendment crystallized more recently. Today the central organizing concept of First Amendment doctrine is the distinction between contentbased regulations and content-neutral ones.

Mark Tushnet, The Supreme Court and Its First Amendment Constituency, 44 Hastings L.J. 881, 882 (1993) (describing the Supreme Court's changing approach to free speech cases).

n28 Unfortunately, the Court's distinction between viewpoint-based and content-based discrimination has not always been precise. See Marjorie Heins, Viewpoint Discrimination, 24 Hastings Const. L.Q. 99, 101 (1996) (stating that "the Court's First Amendment decisions have ricocheted between a focused emphasis on viewpoint discrimination as the ultimate First Amendment evil, and broader condemnations of 'content discrimination'").

n29 Government restrictions that are content-based must be necessary to serve a compelling state interest and narrowly drawn to that end. See Tribe, supra note 17, <sect> 12-13 at 798-99.

n30 See Geoffrey R. Stone, Content Regulation and the First Amendment, 25 Wm. & Mary L. Rev. 189, 196 (1983) (stating that the Supreme Court "has invalidated almost every contentbased restriction that it has considered in the past quarter century"). But see Burson v. Freeman, 504 U.S. 191 (1992) (plurality opinion) (upholding the constitutionality of a restriction on political speech within 100 feet of entrance to polling places).

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There are, however, several exceptions to these rules. First, while commercial speech may not be restricted on the basis of viewpoint, n31 its content may be regulated subject to a less demanding intermediate standard of review. n32 Though more generous than that applied to fully protected speech, the protective nature of this standard is considerable. In the past five years, its application has led the Court to uphold only one restriction on the content of commercial speech. n33 Indeed, sev [*161] eral recent opinions indicate that a majority of courts favor applying strict scrutiny review to restrictions on most commercial speech. n34

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n31 See R.A.V. v. City of St. Paul, 505 U.S. 377, 393 (1992) (stating that states may not, for example, single out and regulate commercial advertising that depicts men in a demeaning fashion).

n32 See Central Hudson Gas & Electric Corp. v. Public Serv. Comm'n, 447 U.S. 557 (1980) (declaring that a state must establish a substantial interest in order to regulate commercial speech). Under this standard, the State's interests must be substantial, the challenged regulation must directly and materially advance the interest, and the extent of the speech restriction must be in reasonable proportion to the interests served. See id. at 564.

n33 Since 1992, the Supreme Court has decided seven commercial speech cases, invalidating the restrictions in five cases and upholding them in only two. See Ibanez v. Florida Dept. of Bus. Prof'l. Regulation, Bd. of Accountancy, 512 U.S. 136 (1994) (holding that the board of accountancy's censure of an accountant for referring to herself as a certified financial planner violated the First Amendment); Edenfield v. Fane, 507 U.S. 761 (1993) (holding that a ban on inperson solicitations by accountants violated the First Amendment); Rubin v. Coors Brewing Co., 514 U.S. 476, 483-84 (1995) (holding that a labeling ban on beer prohibiting the display of alcohol content violated the First Amendment); 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996) (holding that a statute prohibiting liquor advertisements by retailers violated the First Amendment); Cincinnati v. Discovery Network, Inc., 507 U.S. 410 (1993) (invalidating a ban on news racks containing commercial handbills). But see Florida Bar v. Went For It, Inc., 515 U.S. 618 (1995) (upholding a ban on lawyer solicitations of personal injury clients within 30 days of an accident); United States v. Edge Broadcasting Co., 509 U.S. 418 (1993) (holding that a federal statute banning the broadcast of lottery advertisements in states that do not allow lotteries did not violate the First Amendment).

n34 See City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 421-24 (1993) (stating that intermediate scrutiny should apply to "'core' commercial speech," which does no more than propose a transaction, while commercial, informational speech, which is related to the economic interests of the speaker and its audience, should be fully protected).

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Additionally, certain categories of "low value" expression -- specifically, obscenity, fighting words, defamatory falsehoods, and messages advocating imminent lawlessness -- may be more freely regulated without violating the Constitution. n35 These categories of speech hold this lowly status within First Amendment jurisprudence because they are viewed as contributing little to public discourse or the discovery of truth. n36

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n35 See R.A.V., 505 U.S. at 382 (stating that "a limited categorical approach [for protected speech] has remained an important part of our First Amendment jurisprudence"). Defamation involving public officials and public figures is reviewed under a more rigorous standard than that involving private figures. To be liable for defaming a public official or public figure, the defendant must have known that his or her statement was false or have acted with reckless disregard of the statement's truth or falsity. See also New York Times v. Sullivan, 376 U.S. 254, 279-80 (1964); Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967) (stating that the right to free expression, while it is a general right, is not an unconditional right and may be regulated under some circumstances without violating the Constitution). Defamatory falsehoods against private persons may be proscribed, consistent with the Constitution, if made negligently.

n36 See R.A.V. v. St. Paul, 505 U.S. at 382 (citing Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942)) (noting that obscenity, fighting words, and defamation may be proscribed communications because of their "slight social value as a step to truth and that any benefit that may be derived . . . is clearly outweighed by the social interest in order and morality").

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When considered within this jurisprudential framework, Rust and Casey relegate doctor-patient speech to a category outside the protection of the First Amendment along with defamation, obscenity, fighting words, and speech advocating imminent lawlessness. Like these types of low-value expression, doctor-patient speech is exempt from the requirement of viewpoint neutrality. Indeed, physician-patient speech is arguably even less constitutionally protected than these categories of expression because, according to the Rehnquist Court's decision in R.A.V. v. St. Paul, n37 they may not be regulated on the basis of viewpoint. n38 Also, government restrictions on doctor [*162] patient speech, like restrictions on low-value expression, need only satisfy a due process or negligence standard of constitutional review. n39

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n37 Id. at 377.

n38 See id. at 383-84 (stating that "areas of [low-value] speech can, consistently with the First Amendment, be regulated because of their constitutionally proscribable content . . . .However, they are not categories of speech entirely invisible to the Constitution, so that they may be made the vehicles for content discrimination unrelated to their distinctively proscribable content").

n39 In both Rust and Casey, the Court specifies the types of viewpoint-based regulation of doctor-patient speech that might be unreasonable, and therefore, unconstitutional. In Rust, the Court suggested that a viewpoint-based regulation censoring the speech of publicly funded physicians would violate the First Amendment if the doctors were required to represent the government's opinions as their own, or if their relationships with patients were sufficiently allencompassing to justify the expectation of receiving complete medical advice. See Rust, 500 U.S. at 200. Under the Casey plurality, viewpoint-based regulations on doctor-patient speech are unreasonable if physicians are required to utter statements that are false or misleading. Casey, 505 U.S. at 882.

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Thus, within the Rehnquist Court's First Amendment paradigm, doctor-patient speech has less constitutional value than commercial speech or hate speech. Ironically, a doctor's television advertisement offering to perform a medical procedure for a fee is more protected than a physician's intimate conversations with a patient about symptoms, diagnosis, treatments, and the range of other subjects that are often discussed in the context of this professional relationship. n40

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n40 Similarly, it is ironic that, under the Rehnquist Court's First Amendment jurisprudence, the railings of anti-abortion protesters (euphemistically referred to as "sidewalk counselors") at women as they enter an abortion clinic are afforded greater First Amendment protection than the conversations between these patients and their doctors once inside the medical facility. See Schenck v. Pro-Choice Network of Western New York, 117 S.Ct. 855, 864 (1996) (noting that content-neutral injunctions restricting the time, place, and manner of anti-abortion speech outside abortion clinics are subject to an intermediate standard of review, insuring that the restriction serves a significant government interest); accord Madsen v. Women's Health Ctr., 512 U.S. 753, 765 (1994) (holding that a content-neutral injunction would be upheld if its challenged provisions burdened no more speech than necessary to serve significant government interests).

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With the notable exceptions of Rust and Casey, the Rehnquist Court has not only faithfully adhered to the requirement of viewpoint neutrality, it has been unusually sensitive to the danger posed by this type of government regulation. Indeed, the Court has expanded the definition of viewpoint-based regulation, leading to the invalidation of restrictions that are far less flagrantly viewpoint-based, and far less likely to lead to government coercion, than Rust's gag rule or Casey's "informed consent" statute.

For example, in Lamb's Chapel v. Center Moriches Union Free District, n41 an evangelical church sought permission from a public school to use its facilities after hours to show a film series offering a Christian perspective on child rearing and [*163] family problems. n42 The school board denied the request on the ground that its regulations did not expressly authorize the use of its facilities for religious purposes. n43 The school board argued that its policy of barring all religious groups from using its facilities was consistent with the Supreme Court's decision in Cornelius v. NAACP Legal Defense and Educational Fund, n44 which distinguished between a restriction controlling access to a non-public forum based on the subject of the proposed speech or the identity of the proposed speaker, which was permissible, and viewpoint-based discrimination, which was not. n45 Under Cornelius, the conclusion that a restriction was viewpoint-based could not be inferred merely from an exclusion based on subject matter or speaker identity. Rather, to be deemed impermissibly viewpoint-based, the Court required evidence that the restriction was intended to deny "access to a speaker solely to suppress the point of view he expresses on an otherwise includible subject." n46

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n41 508 U.S. 384 (1993).

n42 See id. at 387-88, 388 n.3 (describing the request for permission by the church to show movies, and listing the movies illustrating Christian perspectives on childrearing).

n43 The board's regulations were promulgated in accordance with a New York statute authorizing local boards to adopt regulations for the use of school property for 10 specified purposes. The list in the statute did not include meetings for religious purposes. The school board's regulations authorized its facilities to be used only for social, civil, recreational, and political purposes, which were included as permissible purposes under the statute. See id.

n44 473 U.S. 788 (1985).

n45 The Court stated: "Control over access to a nonpublic or limited public forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral." Id. at 806.

n46 Id. (emphasis added). See also Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (explaining that "the government's purpose is the controlling consideration" in deciding whether a speech restriction is content-based or content-neutral). The Rehnquist Court continues to send mixed messages about the role of motive in assessing the constitutionality of contentbased regulations. For example, in Madsen v. Women's Health Ctr., 512 U.S. 753 (1994), which was decided one year after Lamb's Chapel, the Court endorsed the notion that governmental purpose is the key to determining whether a regulation is viewpoint-based or viewpoint-neutral. The Court stated: "That petitioners all share the same viewpoint regarding abortion does not in itself demonstrate that some invidious content- or viewpoint-based purpose motivated the issuance of the order." Id. at 763. Ambivalence about the role of motive in assessing the constitutionality of government regulation of speech is not new. See Robert Post, Recuperating First Amendment Doctrine, 47 Stan. L. Rev. 1249, 1268 (1995) ("There is a pervasive ambiguity as to whether courts are to assess the

justification for a regulation [the reasons that can be adduced for its passage] or the motivation for a regulation [the actual psychological intentions of those who enacted it]. These are very different inquiries, and yet the Court has persistently equivocated as to which it means to require."). For a compelling argument in favor of inquiring into governmental motive, see generally Elena Kagan, Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine, 63 U. Chi. L. Rev. 413 (1996).

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In Lamb's Chapel, however, the Court held that the mere [*164] fact that the school board's regulations had the effect of excluding the entire subject of religion from the list of permitted uses was itself sufficient to demonstrate that the restriction constituted "overt, viewpoint-based discrimination" in violation of the First Amendment. n47 Similarly, in Rosenberger v. Rector & Visitors of the University of Virginia, n48 the Court held that the decision of the publicly funded University of Virginia to deny a religious student organization's request for school funds violated the organization's free speech rights. n49 As in Lamb's Chapel, the basis for the exclusion was the subject of the speech (religion) not the particular religious viewpoint (Christian) that the organization sought to express. Nevertheless, the Court deemed the university's decision not to fund all religious expression impermissible viewpoint discrimination, despite the absence of evidence of any intent to discriminate against or promote a particular religious viewpoint. n50

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n47 Lamb's Chapel, 508 U.S. at 343-47 (1993) (Kennedy, J., concurring in part and concurring in the judgment).

n48 515 U.S. 819, 842-45 (1995) (holding that the university's denial of funding to print a Christian student newspaper amounted to unlawful viewpoint discrimination).

n49 The petitioners challenged the university's decision on the ground that it violated their rights under the Free Speech Clause of the First Amendment. The university denied a free speech violation and argued additionally that its decision to grant the students' request for funding would have run afoul of the Establishment Clause of the First Amendment. See id. at 819-20. A majority of the Court rejected the university's Establishment Clause argument. Id. at 819-21.

n50 See id. at 831.

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It is difficult to reconcile the Rehnquist Court's concern about the danger of viewpoint-based regulations in Lamb's Chapel and Rosenberger with its lack of appreciation for the pernicious effect of viewpoint-based restrictions on doctor-patient speech. n51 Patients are especially vulnerable to undue influence from government-dictated, viewpoint-based messages delivered by their physicians. Studies continue to show that patients are largely passive and deferential within the structure of the doctor-patient relationship, n52 and that doctors may respond badly when patients attempt to participate actively in [*165] conversations. n53 All patients, especially those who are poor,

uneducated, young, elderly, and/or members of racial and ethnic minorities have considerable difficulty asking questions and challenging physicians' authority. n54 Moreover, there is evidence that managed care may further constrain patients' ability to question or challenge physicians. n55 As a result, when confronted with the expression of a viewpoint about a preferred medical treatment that carries with it the considerable weight of the State and a physician, it is likely that patients will respond with silence, timidity, confusion, and deference.

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n51 For an analysis of the possible negative impact on patients and medical decision making of viewpoint-based restrictions on physician speech, see Berg, supra note 2, at 225-31.

n52 See Debra L. Roter et. al., Communication Patterns of Primary Care Physicians, 277 JAMA 350, 355 (1997) (reporting that 66% of physician visits studied were physician-dominated, narrowly focused on biomedical concerns, and characterized by low levels of patient control over communication).

n53 One recent British study found that a majority of doctors had a negative opinion of patients who bring written lists of concerns to medical consultations, describing them as "obsessional," "neurotic," "manipulative," and "authoritarian." See J. Middleton, Written Lists in the Consultation: Attitudes of General Practitioners to Lists and the Patients Who Bring Them, 44 Brit. J. Gen. Prac. 309 (1994) (concluding that it is necessary to overcome doctors' negative stereotypes of patients and advocating the use of written lists to improve communication between doctors and patients).

n54 See Sherrie H. Kaplan et. al., Patient and Visit Characteristics Related to Physicians' Participatory Decision-Making Style, 33 Med. Care 1176, 1182-84 (1995) (interpreting data suggesting that patients over 75 and under 40 exhibit less assertive conversational behaviors [such as question-asking, interrupting, and asserting opinions] than middle-aged patients); P.N. Butow et al., Computer-based Interaction Analysis of the Cancer Consultation, 71 Brit. J. Cancer 1115, 1118 (1995) (patients asked an average of 5.6 questions and spoke for less than 25% of 30minute cancer consultations). See also Berg, supra note 2, at 227 n.133 (listing several articles discussing research showing that "patients rarely ask questions during conversations with physicians or take control of topics that are discussed").

n55 See Ezekiel J. Emanuel & Nancy Neveloff Dubler, Preserving the Physician-Patient Relationship in the Era of Managed Care, 273 JAMA 323, 328 (1995) (discussing the effects that productivity requirements imposed by managed care organizations may have on opportunities for physician-patient communication); Kaplan et al., supra note 55, at 1185 (presenting data indicating that short office visits are associated with decreased patient participation in conversations with physicians).

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## III. SPEAKER AUTONOMY

In addition to being acutely sensitive to the danger of viewpoint-based regulations, the Rehnquist Court has, since Rust and Casey, been fiercely

protective of speaker autonomy, particularly in the area of negative speech rights. n56 Indeed, the Court has often discussed the bar against government-compelled speech, particularly when ideologically based, in absolute terms. For example, Justice Souter, the author of the plu [*166] rality opinion in Casey, recently stated:

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n56 The term "negative speech rights" refers to the right not to be compelled to speak. See Wooley v. Maynard, 430 U.S. 705, 714 (1976) ("The right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all").

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> Although the State may at times 'prescribe what shall be orthodox in commercial advertising' by requiring the dissemination of 'purely factual and uncontroversial information' . . . outside that context it may not compel affirmance of a belief with which the speaker disagrees . . . . Indeed, this general rule that the speaker has the right to tailor the speech, applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid. n57

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n57 Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557, 573 (1995) (finding that a state court's application of a civil rights law to require organizers of a St. Patrick's Day parade to admit a contingent of gay and lesbian marchers violated the organizers' First Amendment rights).

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This heightened intolerance of restrictions on negative speech rights has led the Court to invalidate regulations that are far less constraining of speaker autonomy than those it upheld in Rust and Casey. For example, in McIntyre v. Ohio Elections Commission, n58 a pamphleteer challenged a fine imposed by the Ohio Elections Commission for distributing an anonymous leaflet in connection with a referendum on a proposed school tax levy. The fine was assessed in accordance with a state statute that required persons producing campaign literature to identify themselves. n59 The state argued that the statute's mandated disclosure requirement facilitated informed political decision making and maintained the integrity of the electoral process, a rationale strikingly similar to that proffered by the state to justify the compelled speech requirement in Casey. n60

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n58 514 U.S. 334 (1995) (holding that Ohio's statutory prohibition against the distribution of any anonymous campaign literature violated the First Amendment).

n59 Id. at 338 n.3 (citing Ohio Rev. Code Ann. <sect> 3599.09 (A) (1988) (repealed 1995)).

n60 See McIntyre, 514 U.S. at 341 ("Ohio maintains that the statute under review is a reasonable regulation of the electoral process").

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In deeming the fine unconstitutional, Justice Souter, writing for the majority, firmly grounded the Court's holding in the personal liberty theory of the First Amendment, n61 stating that "an author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of publi [*167] cation, is an aspect of the freedom of speech protected by the First Amendment." n62 Speaker autonomy is unconstitutionally constrained, according to Justice Souter, even when government compels an individual to speak or write something as seemingly innocuous and viewpoint-neutral as his or her own name. n63

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n61 For a general discussion of the personal liberty theory of the First Amendment, see C. Edwin Baker, Human Liberty and Freedom of Speech 24 (1989) ("Freedom of speech may be defensible, not because of the marketplace of ideas' supposed capacity to discover truth, but because freedom of speech embodies respect for the liberty or autonomy and responsibility of the participants").

n62 McIntyre, 514 U.S. at 340.

n63 See id. at 342 (declaring interest in having published materials enter the marketplace of ideas outweighs need for disclosure of the anonymous author's identity).

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In Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, n64 the Court again invalidated a state restriction that infringed upon speaker autonomy in a far more attenuated way than the regulations at issue in Rust and Casey. Hurley dealt with the constitutionality of a Massachusetts court's ruling ordering the organizers of a St. Patrick's Day parade to admit a contingent of gay and lesbian marchers. The state court had ruled that a parade is not expression, but is rather an event subject to a law barring discrimination on the basis of sexual orientation in public accommodations. n65 The Supreme Court disagreed. Again, Justice Souter, this time writing for a unanimous Court, held that the state court order violated the "fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message." n66

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n64 515 U.S. 557 (1995) (limiting state's right to alter expressive content of parade on grounds of First Amendment protection).

n65 Hurley, 515 U.S. at 563 (stating that the state court "concluded that the parade is not an exercise of [the Council's] constitutionally protected right of expressive association, . . . ").

n66 Id. at 573.

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When considered in light of the plurality opinion in Casey, Justice Souter's opinions in McIntyre and Hurley are rather remarkable. First, the State undoubtedly offends speaker autonomy by compelling individuals to sign their names to a leaflet when they would otherwise choose not to. However, a far more substantial infringement of speaker autonomy occurs when, as in Rust and Casey, individuals are compelled to speak when they would otherwise choose to remain silent, and are compelled to express a viewpoint not their own. While permitting physician/speakers to disclaim agreement with the government's message may lessen the regulation's coercive [*168] effect on listeners, a disclaimer does not diminish the distortion of the speaker's mental process, or autonomy in determining the content of his or her expression.

Furthermore, the court-ordered inclusion of a group of gay and lesbian marchers in a St. Patrick's Day parade in Hurley is far less constraining of speaker autonomy than the measures at issue in Rust and Casey. Hurley's court order did not require any alteration in the words spoken by any individual, nor did it interfere with the thinking or expression of any speaker. n67 Rather, by requiring the inclusion of a government-selected group in a parade (which already included such diverse contingents as those protesting the presence of England in Northern Ireland and those opposed to illegal drugs), the government altered the context or form of the organizers' expression, while leaving alone the thinking and speech of individual participants. n68 This far more mediated interference with individual speech, thought, and autonomy was nevertheless deemed unconstitutional by a unanimous Court.

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n67 The Supreme Court describes the interference as "intimately connected with the communication advanced . . . ," rather than as an infringement of individual speech or thought. Id. at 576.

n68 "We use the word 'parade' to indicate marchers who are making some sort of collective point, not just to each other but to bystanders along the way . . . . Parades are thus a form of expression, not just motion . . . ." Id. at 568 (citations omitted).

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The Rehnquist Court's failure to perceive an unacceptable infringement on physicians' speech rights in Rust and Casey may, as one commentator has approvingly suggested, rest upon its acceptance of the proposition that speaker autonomy is not implicated unless the expression involved originates in the intentions and free communicative will of an individual. n69 According to this theory, since physician speech about diagnosis and treatment is shaped by the norms of the medical profession, it is the profession, and not the individual doctor, that is the speaker. n70 Viewed from this perspective, the measures at [*169] issue in Rust and Casey do not infringe upon speaker/physician autonomy, because doctors lack free choice in determining the content of their conversations with patients.

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n69 See Randall P. Bezanson, Institutional Speech, 80 Iowa L. Rev. 735, 765 (1995) (describing speech that belongs to no individual and is not "traceable to the speech intentions of other natural persons" as not protected from government regulation under the First Amendment).

n70 There is language in Casey to support Professor Bezanson's view that the Court views professional speech as having an attenuated connection to First Amendment values because it is shaped by professional norms. See Casey, 505 U.S. at 884 (referring to a physician's First Amendment right not to speak as "only a part of the practice of medicine . . . "). However, more recently, Justice O'Connor, writing for the majority, seemed to take the opposite view in stating that the speech of professionals in the context of a professional relationship is fully protected by the First Amendment. See Florida Bar v. Went For It, Inc., 515 U.S. 618, 634 (1995) ("Speech by professionals obviously has many dimensions. There are circumstances in which we will accord speech by attorneys on public issues and matters of legal representation the strongest protection our Constitution has to offer"). This inconsistency suggests that the plurality opinion in Casey, of which Justice O'Connor was a co-author, was not driven by a general First Amendment theory of professional speech, but by the fact that the physician speech at issue in that case concerned the contentious subject of abortion. See footnote 95, infra, and accompanying text.

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However, the conclusion that physician speech rights are not at stake in conversations with patients rests upon several highly questionable premises. First, the claim that the norms of the medical profession supplant physician autonomy during conversations with patients is overstated. The content of physician speech is certainly influenced (one hopes) by the ethical standards of the medical profession, and parts of it, particularly those regarding diagnosis and treatment, may at times be wholly determined by the science of medicine. Nonetheless, it is individual physicians, and not the medical profession, who retain the ultimate authority in determining what to say to patients and whether to speak at all. This balance of power between individual doctors and the profession is reflected in the therapeutic exception to the doctrine of informed consent, under which physicians may remain silent about a patient's condition or a treatment alternative if they reasonably believe that speaking would cause the patient harm. n71

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n71 See, e.g., Canterbury v. Spence, 464 F.2d 772, 788-89 (D.C. Cir. 1972) (recognizing an exception to the duty of informed consent if the physician reasonably concludes that the disclosure of risks would threaten a patient's well-being); Bernard v. Char, 903 P.2d 676, 683 (Haw. Ct. App. 1995), (recognizing that risk information may be withheld if detrimental to patients under the therapeutic exception to informed consent) modified on other grounds by 903 P.2d 667 (Haw. 1995) (establishing an objective standard for informed consent in Hawaii); N.Y. Pub. Health Law <sect> 2805-d(4)(d) (McKinney 1993) (stating exception to the duty of informed consent if physician reasonably believes that disclosure would adversely affect patient).

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Additionally, the view that speaker autonomy is not implicated unless speech is entirely a product of individual free will is grounded in an overly atomistic and decontextualized concept of autonomy. An individual's decision about what words to utter when communicating with another human being is always influenced, to varying degrees, by existing social relations and roles, by cultural and institutional norms, and by the [*170] ideas and expectations of others. Very little human expression would qualify for First Amendment protection if it had to be free of the influence of intellectual disciplines, social relations, and institutional norms. n72

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n72 For an argument that speech should be protected precisely because of its relationship to social structures and relations, see Post, supra note 46, at 1250 (asserting that the constitutional value of speech inheres not in speech itself, but in particular social practices facilitated by speech).

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Finally, Casey's conclusion that physician speech should be deprived of full First Amendment protection because "it is subject to reasonable licensing and regulation by the State" turns traditional First Amendment methodology on its head. n73 Rather than focusing on the necessity of limiting speech under certain circumstances, the traditional method for determining whether speech is protected in the first instance is to assess whether the expression facilitates First Amendment values. It is the function of the constitutional standard of review to protect the speech when it facilitates those values, and to permit government regulation in those exceptional instances when those values are outweighed by the expression's negative impact.

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n73 Casey, 505 U.S. at 884.

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IV. LISTENER AUTONOMY

Since Rust and Casey, the Rehnquist Court has, as a general matter, presumed that listeners are capable of defining, and therefore ought to be free to define, their own communicative needs and interests. n74 Consequently, the Court has been highly circumspect when considering regulations that are justified on the ground that a State-structured dialogue is needed to protect listeners' informational needs. In the absence of empirical supporting evidence, the Rehnquist Court has consistently rejected the argument that a regulation is necessary to safeguard audience-based interests.

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n74 The Rehnquist Court recently strongly endorsed the principle that the First Amendment protects the audience-based right to receive information. See, e.g., Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622, 663 (1994) ("Assuring that the public has access to a multiplicity of information sources

is a governmental purpose of the highest order, for it promotes values central to the First Amendment").

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The Rehnquist Court's reverence toward listener autonomy is most apparent in a series of commercial speech cases illustrated by Edenfield v. Fane. n75 Here, the Court considered the [*171] constitutionality of a Florida ban on in-person solicitations by accountants. The state argued that the ban was necessary to protect consumers from fraud and overreaching by accountants eager for new clients. The state did not, however, offer any evidence to support this claim. The Court held that the state's unsupported "suppositions" about the inability of consumers to judge for themselves the appropriateness of the accountants' speech was insufficient to justify the regulation. n76

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n75 See, e.g., 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996) (holding that a statute prohibiting liquor advertisements by retailers violated the First Amendment); Rubin v. Coors Brewing Co., 514 U.S. 476, 483-84 (1995) (holding that a labeling ban on beer prohibiting the display of alcohol content violated the First Amendment); Ibanez v. Florida Dept. of Bus. Prof'l Regulation, Bd. of Accountancy, 512 U.S. 136 (1994) (reversing a lower court's finding that the Florida Board of Accountancy properly reprimanded an accountant for advertising her credentials as CPA and CFP in her commercial communications concerning her law practice, and finding a violation of her First Amendment rights); Edenfield v. Fane, 507 U.S. 761 (1993) (holding that a ban on in-person solicitations by accountants violated the First Amendment).

n76 Edenfield, 507 U.S. at 770 (noting that the State produced no studies or anecdotal evidence to support the assumption that consumers would be misled or overwhelmed by in-person solicitations by CPAs).

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Since Rust and Casey, the Rehnquist Court has upheld only one regulation that was justified on the ground that it was needed to protect audience-based interests. n77 In this case, however, which involved a ban on the use of direct mail by personal injury lawyers soliciting new clients, the state produced a lengthy empirical study demonstrating that the public did in fact need government protection from this speech. n78

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n77 See Florida Bar v. Went For It, Inc., 515 U.S. 618 (1995) (holding that the Florida Bar has a "substantial interest both in protecting the privacy and tranquility of personal injury victims" and remarking that studies show that "the harms targeted by the ban are quite real").

n78 Florida Bar, 515 U.S. at 618 (stating that the study summary contained both statistical and anecdotal data supporting the Florida Bar's position).

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